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Recent Developments

Various Editors

RECENT DEVELOPMENTS

ALIENS — McCARRAN ACT — ADMITTED HOMOSEXUAL CAN BE DEPORTED AS "PSYCHOPATHIC PERSONALITY" WITHIN ACT, EVEN WITHOUT A MEDICAL EXAMINATION.

Boutilier v. INS (2d Cir. 1966)

In September 1963 petitioner filed an application for naturalization in which he admitted that he had been arrested for and discharged of the crime of sodomy.[1] In reply to an immigration officer's request for more information, he revealed a history of homosexual activity which had begun prior to his entry into the United States.[2] This disclosure was relayed for review to the United States Public Health Service which found that petitioner "was afflicted with a class A condition, namely, psychopathic personality, sexual deviate, at the time of his admission to the United States for permanent residence. . . ."[3]

Deportation proceedings were commenced, and at hearings held before a special inquiry officer,[4] petitioner declined to submit to an examination conducted by Public Health Service doctors. The officer found that petitioner had been a homosexual at the time of entrance into the United States and was therefore deportable.[5] After an unsuccessful appeal to the Board of Immigration Appeals,[6] a petition to vacate the order was filed

1. N.Y. PEN. LAW § 690.

2. Boutilier admitted that his first homosexual experience occurred in Canada when he was fourteen years of age and that from the time he was sixteen until the time he came to the United States five years later, he voluntarily engaged in homosexual activity on the average of three or four times per year. His continued deviancy after entry into the United States caused the Selective Service System to designate him as unfit for military service. Boutilier v. INS, 363 F.2d 488 (2d Cir.), *cert. granted*, 385 U.S. 927 (1966).

3. *Id.* at 491.

4. "A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien. . . ." Immigration and Nationality Act of 1952 § 242(b), 66 Stat. 208, 8 U.S.C. § 1252(b) (1964) [hereinafter cited as McCarran Act].

5. "Any alien in the United States . . . shall . . . be deported who — (1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry. . . ." McCarran Act § 241(a), 66 Stat. 204 (1952), 8 U.S.C. § 1251(a) (1964). "[T]he following classes of aliens shall be . . . excluded from admission into the United States: . . . (4) Aliens afflicted with psychopathic personality. . . ." McCarran Act § 212(a), 66 Stat. 182 (1952), 8 U.S.C. § 1182(a) (1964).

No serious question was raised by the petitioner at the deportation hearing concerning the Public Health Service's finding that he was a homosexual. The controversy centered upon the propriety of the service's determination that a homosexual is necessarily afflicted with a psychopathic personality.

6. "The Board is a quasi-judicial body in the Office of the Attorney General. The Board has jurisdiction to review on appeal orders entered by special inquiry officers in deportation cases. . . ." U.S. OFFICE OF THE FEDERAL REGISTER, UNITED STATES ORGANIZATION MANUAL 225 (1965-66).

with the United States Court of Appeals for the Second Circuit. The court dismissed the petition *holding* that (1) the Public Health Service could conclude on these facts that petitioner was afflicted with a psychopathic personality without conducting a medical examination since such an examination is mandatory only in exclusion proceedings, and (2) the term "psychopathic personality" as used in the McCarran Act is not void for vagueness since the act's purpose is not to regulate conduct, but to exclude aliens who possess certain characteristics. *Boutilier v. INS*, 363 F.2d 488 (2d Cir.), *cert. granted*, 385 U.S. 927 (1966).

In essence, Boutilier raises two significant points in his petition. He insists that by reason of section 234 of the McCarran Act[7] he is entitled to a medical examination before it may be certified that he is afflicted with a psychopathic personality, notwithstanding his earlier disinclination to submit to such an examination.[8] He further maintains that the term "psychopathic personality" is void for vagueness, thus making the deportation order issued pursuant to it an act which deprives him of due process of law.

While it has long been held by the Supreme Court that the power to exclude aliens is an exercise of the constitutional grant to the federal political departments to control foreign relations, and therefore exempt from judicial review,[9] deportation procedures have not been accorded an identical immunity.[10] The application of these established doctrines to the "delayed exclusion" provision of the McCarran Act[11] raises a problem of statutory construction since the proceeding under this provision is by explicit statement of the act one of deportation, and yet the standard set to determine

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7. The physical and mental examination of arriving aliens . . . shall be made by medical officers of the United States Public Health Service, who shall . . . certify . . . [any medical defect] observed by such medical officers in any such alien. . . . Medical officers . . . who have had special training in the diagnosis of insanity and mental defects shall be . . . employed . . . and . . . shall be provided with suitable facilities for the . . . examination of all arriving aliens who it is suspected may be excludable under paragraphs . . . (4) . . . of section 1182(a). . . . McCarran Act § 234, 66 Stat. 198 (1952), 8 U.S.C. § 1224 (1964). See statute cited note 5 *supra*.

8. It could be urged that Boutilier is estopped from making this contention [that he is entitled to an examination] in view of his rejection of the government's offer to have the Public Health Service conduct an *in personam* examination. But, in view of the serious consequences of a deportation order and the government's failure to press this point, we shall make our determination on the merits. 363 F.2d at 492 n.8.

9. Harisiades v. Shaughnessy, 342 U.S. 580, 588–89 (1952); Fong Yue Ting v. United States, 149 U.S. 698, 713 (1893); Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892). See also Chae Chan Ping v. United States, 130 U.S. 581 (1889).

10. Findings of fact in deportation proceedings, which are initially administrative, are final unless determined to be clearly erroneous. Heikkila v. Barber, 345 U.S. 229 (1953); Kessler v. Strecker, 307 U.S. 22, 34–35 (1939); United States *ex rel.* Vajtauer v. Commissioner, 273 U.S. 103 (1927); United States *ex rel.* Tisi v. Tod, 264 U.S. 131 (1924). *But cf.* Bridges v. Wixon, 326 U.S. 135 (1945). However, the courts will have the final authority over questions of statutory construction. Bridges v. Wixon, 326 U.S. 135, 149 (1945); Gegiow v. Uhl, 239 U.S. 3 (1915); Gonzales v. Williams, 192 U.S. 1 (1904). See also Rosenberg v. Fleuti, 374 U.S. 449 (1963). See generally Note, 5 STAN. L. REV. 722 (1953); Comment, 8 VILL. L. REV. 566 (1963).

11. McCarran Act § 241(a)(1), 66 Stat. 204 (1952), 8 U.S.C. § 1251(a)(1) (1964). See statute cited note 5 *supra*. See Note, 68 YALE L.J. 931 (1959).

deportability is that of excludability at the time of entry. An examination of the cases decided under this section and under a similar section in the prior act reveals that the scope of judicial review has been severely limited by the courts on the theory that in an area such as this, where the determination of deportability is dependent upon the application of complex and uncertain medical theories, the responsibility for application should rest with those suited to do so, and not with the courts.[12]

The legislative history of the act indicates that Congress intended to exclude homosexuals and other sexual deviates from admission to the United States by its use of the term psychopathic personality.[13] Several courts have read the act in this light and have barred sexual deviates from entering the country.[14] In the instant case, the court summarily dismissed petitioner's claim that he was entitled to an examination to determine his mental state under section 234[15] by finding that the section applies only to exclusion proceedings and not to deportation proceedings.[16] Since the petitioner is subject to deportation, not exclusion, the standards governing that proceeding are set forth in section 242(b).[17] The court noted that, "Boutilier does not claim that the government failed to comply with the rules and regulations which guide the conduct of deportation proceedings."[18]

The Court's finding that section 234 did not apply and that Boutilier failed to claim that there was a violation of the procedure set forth in section 242(b), was the only consideration given to the question of whether the petitioner's rights were violated by the absence of a medical examination. It is suggested, however, that further analysis of the relevant sections of the act raises a question of statutory construction, the answer to which might indicate that petitioner's rights were violated or at least ignored. It may be asked: if an entering alien must be given a medical examination in order to be certified a psychopathic personality and therefore excludable at the time of entry, and excludability at the time of entry is the crucial prerequisite to his present deportability, does it not follow that he must now be given a medical examination to establish excludability? There are arguments both for and against this construction,[19]

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12. *E.g.*, United States *ex rel.* Leon v. Murff, 250 F.2d 436 (2d Cir. 1957), *affirming* United States *ex rel.* Leon v. Shaughnessy, 143 F. Supp. 270 (S.D.N.Y. 1956); United States *ex rel.* Pawlowec v. Day, 33 F.2d 267 (2d Cir.), *cert. denied*, 280 U.S. 594 (1929). See Note, 68 YALE L.J. 931, 933–42 (1959).

13. Existing law does not specifically provide for the exclusion of homosexuals and sex perverts. . . . The Public Health Service has advised that the provisions for the exclusion of aliens afflicted with psychopathic personality . . . is sufficiently broad to provide for the exclusion of homosexuals and sex perverts. This change of nomenclature is not to be construed in any way as modifying the intent to exclude all aliens who are sexual deviates.

S. REP. No. 1137, 82d Cong., 2d Sess. 9 (1952).

14. Quiroz v. Neelly, 291 F.2d 906 (5th Cir. 1961); United States v. Flores-Rodriguez, 237 F.2d 405 (2d Cir. 1956). See Note, 38 N.Y.U.L. REV. 191 (1963).

15. See statute cited note 7 *supra*.

16. 363 F.2d at 492.

17. 66 Stat. 208 (1952), 8 U.S.C. 1252(b) (1964).

18. 363 F.2d at 492.

19. The principal argument against such a reading is: if this were the intent of Congress, it could have expressly so stated, as it did in the exclusion procedure,

but it is disturbing that the court did not even consider whether the procedure presently employed complies with even the narrowest construction of the statute.

The dissent presumably disagrees with the statutory interpretation rendered by the majority but does not offer an alternative, or even consider one. Instead it is asserted: "Both the procedure and the statutory interpretation used by the immigration authorities in this deportation proceeding are not only offensive to, but, in my opinion, completely lacking in, due process. . . ."[20] It is submitted that an argument such as advanced above, rather than due process, would have been more pointed, and possibly more cogent, especially in light of the poor reception due process arguments have been given in deportation proceedings.[21]

Judge Kaufman, writing for the majority, next turned to a consideration of Boutilier's contention that the use of the term "psychopathic personality" renders the statute vague and therefore void. He dismissed this contention because "upon examining the rationale of the void-for-vagueness doctrine," the court concluded that it was inapplicable.[22] The underlying rationale of the doctrine is the fiction that everyone knows the law. From this proposition stems the corollary that, "legislation must be sufficiently precise to afford adequate notice of the standards by which the individuals affected are required to guide themselves."[23] This corollary has been recognized by the Supreme Court in *United States v. L. Cohen Grocery Co.*,[24] as being based upon the fifth[25] and sixth[26] amendments. The Court in *Cohen* therefore reasoned that:

> The sole remaining inquiry . . . is the certainty or uncertainty of the text in question, that is, whether the words [of the statute] . . . constitute a fixing by Congress of an ascertainable standard of guilt and are adequate to inform persons accused of violation thereof of the nature and cause of the accusation against them.[27]

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and further, since the criteria is the condition at the time of entry, a present examination is worthless. On the other hand, it might be contended that deportation is more serious than exclusion and if Congress extended this right to incoming aliens to whom it owed no duty, surely it intended to provide at least the same protection to those who have become residents. Secondly, since psychopathy does not develop instantaneously, its present existence is at least an indication of previous existence.

20. 363 F.2d at 496.

21. *E.g.*, in Shaughnessy v. United States *ex rel*, Accardi, 349 U.S. 280 (1955), publication of Attorney General's belief that alien was deportable was held not to be basis for attributing bias to Board of Immigration Appeals under his supervision. In Low Wah Suey v. Backus, 225 U.S. 460 (1912), preliminary interrogation in the absence of counsel and denial of process to compel testimony was permitted. See United States *ex rel.* Tisi v. Tod, 264 U.S. 131 (1924). See Note, 5 STAN. L. REV. 722 (1953); Note, 68 YALE L.J. 931 (1959).

22. 363 F.2d at 495. For commentary on the void for vagueness doctrine see generally Collings, *Unconstitutional Uncertainty — An Appraisal*, 40 CORNELL L.Q. 195 (1955); Note, 62 HARV. L. REV. 77 (1948); Note, 109 U. PA. L. REV. 67 (1960).

23. 363 F.2d at 495.

24. 255 U.S. 81 (1921); *accord*, Cline v. Frink Dairy Co., 274 U.S. 445, 458 (1927).

25. "No person shall be . . . deprived of life, liberty or property, without due process of law. . . ." U.S. CONST. amend. V.

26. "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation. . . ." U.S. CONST. amend. VI.

27. United States v. L. Cohen Grocery Co., 255 U.S. 81, 89 (1921).

In light of these constitutional requirements the Supreme Court has decided that, "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."[28]

Since the void for vagueness doctrine is applicable to statutes "which either forbid or require the doing of an act," the doctrine necessarily finds its greatest application in criminal statutes.[29] However, the instant case is not concerned with a criminal statute which seeks to control behavior. It is one which merely establishes a characteristic based on past behavior. In as much as there is nothing that Boutilier can do or refrain from doing in order to remove himself from this category, he is not within the group to which the void for vagueness doctrine affords protection.[30] Application of the doctrine in this case would be unseemly for another reason. Since the statute concerns behavior which has occurred in other countries, application here would necessitate the extention of the fiction to the point of assuming that foreign citizens are aware of a United States law and thereby able to guide their conduct accordingly.

On two occasions the Court of Appeals for the Ninth Circuit has been faced with the problem of applying the void for vagueness doctrine to this section of the act. In *Fleuti v. Rosenberg,*[31] it was established that the petitioner had engaged in homosexual activity both prior and subsequent to entry into this country. The court found that the special inquiry officer had relied heavily on evidence of the post-entry behavior in concluding that petitioner was a homosexual and therefore suffering from a psychopathic personality. In light of this, the court held that the void for vagueness doctrine was applicable because the statute did not give an adequate warning. In *Boutilier* the court distinguishes this case on the ground that, "there is not the slightest indication that the officer [in the instant case] failed to understand that section 212(a)(4) was directed solely at a pre-entry condition."[32] However, in a recent per curiam opinion, the Ninth Circuit has apparently extended its application of the doctrine to cases where the only evidence is that of pre-entry homosexual behavior.[33] In declaring the statute void the court stated that the petitioner's deportation is "grounded upon a finding that he was, at the time of entry to this

28. Connally v. General Const. Co., 269 U.S. 385, 391 (1926); *accord,* Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939).

29. While deportation proceedings are not criminal in nature the Supreme Court has said, "deportation is a drastic measure and at times the equivalent of banishment or exile. . . ." Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948). For this reason the void for vagueness doctrine has been applied in deportation cases. Jordan v. De George, 341 U.S. 223, 231 (1951).

30. 363 F.2d at 495.

31. 302 F.2d 652 (9th Cir. 1962), *remanded on other grounds,* 374 U.S. 449 (1963).

32. 363 F.2d at 495. It may be argued that *Fleuti* need not have been decided on a constitutional basis but on the fact that the special inquiry officer had overstepped his statutory authority in considering post-entry behavior in his finding.

33. Lavoie v. INS, 360 F.2d 27 (1966), *petition for cert. filed,* 35 U.S.L. WEEK 3131 (U.S. October 11, 1966) (No. 513).

country, a homosexual. . . ."[34] The only authority cited is the court's prior opinion in *Fleuti,* thus apparently discounting any difference in facts.

Noting the opinion of the Ninth Circuit, Congress, in amending the statute, stated: "To resolve any doubt the Committee has specifically included the term 'sexual deviation' as a ground for exclusion in this bill."[35] The passage of this legislation and the decision in the instant case, however, have not resolved all of the unanswered questions that are inherent in this type of proceeding. Since the question of whether petitioner's behavior qualifies him as homosexual or sexual deviate was all but conceded at the deportation hearing,[36] the court was not called upon to resolve two problems which are engendered by the use of these terms by Congress in its effort to clarify the meaning of "psychopathic personality." These problems are raised by Judge Moore in his dissenting opinion. Admittedly, the terms sexual deviate and homosexual narrow the open-ended classification, psychopathic personality, but, what in fact do they mean? Does Congress seek to exclude everyone who has ever had an abnormal sexual experience, or only to exclude those who have "a long-lasting and perhaps compulsive orientation towards homosexual or otherwise 'abnormal' behavior"?[37] It is urged by the dissent that adoption of the former interpretation of congressional intent would be absurd in light of a number of scientific studies on human sexual behavior which conclude that a significant percentage of American males have had at least one homosexual experience.[38] Assuming that the latter interpretation is adopted, a second question manifests itself. Is the evidence of Boutilier's pre-entry behavior persuasive enough to justify a determination that he is a homosexual or sexual deviate? Judge Moore thinks not. "The most adverse conclusion which can be derived from petitioner's statements is that petitioner engaged in sexual activity on a quite infrequent basis with both men and women during the five-year period before his coming to the United States."[39]

There is no easy solution to this problem. Congress has the right to exclude whomever it pleases and to base exclusion on any reasonable classification. But in this case the classification is based on open-ended medical terms, the nature and extent of which are not agreed upon by competent medical authority. Although the legislative history indicates that these terms are used as words of art, "and not to be left to vagaries and honest but conflicting theories of psychiatry for determination,"[40] the conclusion is inescapable that until more definite and possibly arbitrary criteria are established by judicial or legislative action, the honest but conflicting theories of psychiatry are, in fact, the only standards avail-

34. *Id.* at 28.
35. S. REP. No. 748, 89th Cong., 1st Sess. 19 (1965).
36. Brief for Respondent, p. 26a.
37. 363 F.2d at 498.
38. *E.g.,* KINSEY, POMEROY & MARTIN, SEXUAL BEHAVIOR IN THE HUMAN MALE 623 (1948); MASTERS & JOHNSON, HUMAN SEXUAL RESPONSE (1966).
39. 363 F.2d at 496.
40. 363 F.2d at 493.

able. The mere statement that the terms are used as words of art adds nothing to the solution of the problem. Since it appears at this juncture that the Supreme Court will review *Boutilier,* it is possible that the existing conflict between the Second and Ninth Circuits concerning the effect of the void for vagueness doctrine on the statutory term "psychopathic personality" will be resolved. It is hoped that the Court will determine also whether a medical examination — required in exclusion proceedings — is mandatory in deportation proceedings which are based on prior excludability.

Marc B. Kaplin

ANTITRUST — MERGERS — FTC HAS IMPLIED POWER TO PETITION FOR A PRELIMINARY INJUNCTION WHICH A COURT OF APPEALS CAN GRANT WHEN IT IS REASONABLY PROBABLE THAT THE PROPOSED MERGER WILL BE VIOLATIVE OF SECTION 7 OF THE CLAYTON ACT.

FTC v. Dean Foods Co. (U.S. 1966)

Prior to the completion of an investigation by the Federal Trade Commission to determine whether a proposed merger[1] of Bowman Dairies and Dean Foods would be violative of section 5 of the Federal Trade Commission Act[2] and section 7 of the Clayton Act,[3] the FTC sought and was granted, by the Seventh Circuit Court of Appeals, a temporary restraining order to maintain the status quo between the two companies. The Commission alleged that it would probably find the contemplated merger illegal, and that if the merger were permitted to take place it would be virtually impossible to frame an effective cease and desist order

1. The proposed merger would result in Dean Foods Company, the third or fourth largest distributor of packaged milk in the Chicago area, taking over all of the processing and retailing facilities of Bowman Dairies Company, the second largest competitor in the area. Bowman would remain as a holding company for the remaining securities, and would reinvest the purchase price paid by Dean Foods for the stockholders. See FTC v. Dean Foods Co., 384 U.S. 597, 599 & n.1 (1966).

2. 52 Stat. 111 (1938), 15 U.S.C. § 45(a)(1) (1964). "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared illegal."

3. 64 Stat. 1125 (1950), 15 U.S.C. § 18 (1964). In pertinent part it states:

No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in

since Bowman as a viable entity would no longer exist.[4] The FTC further alleged that as a consequence the court of appeals would be deprived of jurisdiction to review the final Commission decision. At the hearing for a preliminary injunction the court of appeals dissolved the restraining order on the ground that the FTC lacked authority to petition for such relief.[5]

Upon dissolution of the restraining order the two companies moved to complete the merger. The Solicitor General, on behalf of the FTC, immediately applied to the Supreme Court and was granted a preliminary injunction. The Court granted certiorari,[6] reversed and remanded,[7] *holding,* four justices dissenting,[8] that the FTC had authority to seek preliminary injunctions to maintain the status quo until it reached a final decision as to the legality of a merger, and that under the All Writs Act[9] the court of appeals was authorized to issue such injunctions in order to preserve its jurisdiction. *FTC v. Dean Foods Co.,* 384 U.S. 597 (1966).

Considerable legislative activity in the past ten years has revolved around attempts by the FTC to obtain authority from Congress to issue preliminary injunctions against proposed mergers or, in the alternative, the authorization to seek such relief in the federal district courts.[10] However, provisions of the Clayton Act concerning the issuance of preliminary injunctions pending a final determination by the FTC have remained unchanged.[11] Therefore, it can be said that the procedure adopted by the Court is procreative of a new enforcement power in the FTC.

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any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

For an analysis of the recent applications of § 7 see generally Note, *The ABC's of Clayton 7: Amendment of 1950; Brown Shoe; The Court and Current Complexities,* 10 VILL. L. REV. 734 (1965).

4. The FTC's allegation is based on the premise that the contemplated merger terms will result in absorption of assets, sale of capital interests and depletion of corporate management personnel that will in fact extinguish Bowman as a viable corporate entity. If this occurs it becomes virtually impossible to return the economic balance that once existed in the industry since a divestiture order would be incapable of adequately returning the merged company to the two prior existing corporations, Bowman Dairies and Dean Foods.

5. FTC v. Dean Foods Co., 356 F.2d 481 (7th Cir. 1966).

6. FTC v. Dean Foods Co., 383 U.S. 901 (1966).

7. On remand, the Seventh Circuit issued an injunction for four months. FTC v. Dean Foods Co., No. 75493, 7th Cir., July 18, 1966. BNA ANTITRUST TRADE REG. REP. No. 263, July 26, 1966, at A-1. The FTC examiner at the end of the hearing decided that the proposed merger was not violative of either § 5 of the Federal Trade Commission Act or § 7 of the Clayton Act. 3 TRADE REG. REP. (1966 Trade Cas.) ¶ 17,682 (FTC Docket No. 8674, Sept. 12, 1966).

8. Justices Fortas, Harlan, Stewart and White joined in dissenting.

9. 63 Stat. 102 (1949), 28 U.S.C. § 1651(a) (1964). "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

10. For the legislative history, see FTC v. Dean Foods Co., 384 U.S. 597, 636 (1966) (appendix to the dissenting opinion). In the 89th Congress two bills were introduced to amend the Clayton Act in order to give the FTC the statutory power to follow the procedure utilized in the *Dean* case. H.R. 49 & H.R. 1574, 89th Cong., 1st Sess. (1965).

11. Under the Clayton Act the district courts receive petitions for preliminary injunctions from the United States Attorneys under the direction of the Attorney

The question of whether the FTC or other federal agencies have implied authority to seek preliminary injunctions from the courts of appeals has been considered on only two prior occasions.[12] In *Board of Governors of the Fed. Reserve Sys. v. Transamerica Corp.*,[13] the Ninth Circuit Court of Appeals issued a preliminary injunction on petition from the Federal Reserve Board under the All Writs Act. There, banking institutions whose controlling stock interests had been purchased by Transamerica were enjoined from executing contracts to transfer their assets to the Bank of America National Trusts. If this transfer had been permitted to take place the Board would have lost jurisdiction over Transamerica.[14] On these facts the court of appeals granted an injunction in order to prevent its final power of review from being abrogated. Six years later, the Second Circuit Court of Appeals in *FTC v. International Paper Co.*,[15] denied a similiar petition by the FTC that relied on *Transamerica* as precedent. In *International Paper* the court premised its denial of the FTC's petition on the lack of statutory authority vesting the Commission with this power, and also on the ground that it would be a misapplication of the All Writs Act for the courts of appeals to exercise jurisdiction in such a case.

Thus the Supreme Court was faced with a split of authority among the circuits with regard to the availability of the procedure followed in the instant case, as well as the consistent refusal of Congress to amend the Clayton Act in order to vest the FTC with statutory authority to petition for such relief prior to the completion of its hearing procedure. In this context the Court concluded that sufficient necessity existed to permit the FTC to petition directly to the court of appeals for a preliminary injunction, and that an untapped reservoir of judicial authority existed in the All Writs Act to sustain the jurisdiction of the courts of appeals.

Of first import is the question of the FTC's standing to petition for a preliminary injunction based merely on facts indicating that it is reasonably probable that the FTC will find the merger to be illegal.[16] The Court based its finding of FTC authority to do this on two grounds. First, the

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General based on an alleged violation of § 7. 38 Stat. 736 (1914), 15 U.S.C. § 25 (1964). Private individuals may petition for similar relief on equitable grounds. 38 Stat. 737 (1914), 15 U.S.C. § 26 (1964). For a discussion of an individual's right to seek a preliminary injunction, see MacIntyre, *Antitrust Injunctions: A Flexible Private Remedy*, 1966 DUKE L.J. 22.

12. In addition to the two cases referred to there were also two unreported decisions that denied a petition for an injunction similar to the one in the *Dean* case. FTC v. Farm Journal, Inc. (3d Cir. 1955); In the Matter of A. G. Spalding & Bros. (1st Cir. 1955).

13. 184 F.2d 311 (9th Cir.), *cert. denied*, 340 U.S. 883 (1950).

14. This would have been the result based on the interpretation of the unamended § 7 of the Clayton Act (the pre-1950 version) as construed in Arrow-Hart & Hegeman Elec. Co. v. FTC, 291 U.S. 587 (1934).

15. 241 F.2d 372 (2d Cir. 1956). See Note, 32 N.Y.U.L. REV. 1297 (1957).

16. The granting of injunctions under specific statutory powers does not exclude the federal courts from exercising the equitable powers granted them by art. III § 2 of the Constitution. See Public Util. Comm'n v. Capital Transit Co., 214 F.2d 242 (D.C. Cir. 1954).

Court reasoned that the FTC was created to effectuate the general welfare by enforcing the Clayton Act and that it is, therefore, vested with those requisite incidental powers necessary to accomplish this task. Mr. Justice Clark, writing for the majority, concluded that standing to petition for the relief granted in the instant case is one of those necessary incidental powers.[17] Second, the Court noted that since the FTC has standing to institute contempt proceedings for violations of its final cease and desist orders,[18] as well as the authority to act as a party when the court of appeals reviews a final decision, it should logically follow that the FTC has standing to petition for preliminary injunctions from the courts of appeals. In holding the procedure utilized in this case to be valid, the Court also relied on the approach previously adopted in *Transamerica.*

Mr. Justice Fortas incisively takes issue with these propositions, reasoning that the FTC was created contemporaneously with the passage of the Clayton Act as "an expert administrative agency," and was "not intended to be a litigation arm of the United States except in so far as its [own] final orders are concerned."[19] It seems evident that it is detrimental to the purpose of a fact–finding agency to allow it to seek a preliminary injunction prior to completion of its hearing on the merits on the premise that it will probably find that the proposed merger is illegal. To allow the FTC to do so would necessitate not only a pre-judgment, but would also require that the Commission litigate the issue from the same position that it would have assumed if it had made a definitive determination. Coupled with the fact that in specific areas the FTC has been granted statutory authority to petition for preliminary injunctions[20] this strengthens the position that Congress intentionally denied the FTC this power with regard to the enforcement of section 7 of the Clayton Act. In the cases cited by the majority only *Transamerica* squarely supports the Court's action. However, the dissent distinguishes *Transamerica* on the ground that there the jurisdiction of the FTC would have been lost entirely as well as the review jurisdiction of the court of appeals, and that the instant case concerns only the question of the FTC's difficulty in framing an effective cease and desist order.

The second issue that the Court considered was the apparent lack of jurisdiction in the courts of appeals to grant such preliminary relief. While the Clayton Act vests jurisdiction in the courts of appeals to review final FTC orders,[21] nowhere does it vest them with the authority to issue

17. FTC v. Dean Foods Co., 384 U.S. 597, 617 (1966).

18. The majority states in effect that no statutory authorization exists for this power. *Id.* at 607. Justice Fortas writing for the dissent concludes that there is statutory power for the FTC to institute contempt proceedings. *Id.* at 616 n.3 (dissenting opinion).

19. *Id.* at 617 (dissenting opinion).

20. In the area of false advertising the FTC can petition the district court for injunctive relief. 52 Stat. 114 (1938), 15 U.S.C. § 53(a) (1964).

21. 38 Stat. 734 (1914), 15 U.S.C. § 21(c) (1964).

preliminary injunctions. Rather, the Act authorizes the district courts to exercise this power on petition by the Attorney General.[22] Thus the Court found it necessary to go outside the Act and upheld the exercise of jurisdiction by a court of appeals on the basis of the All Writs Act. This statute is designed to give the federal courts the jurisdictional power to execute those writs "necessary or appropriate in aid of their respective jurisdiction. . . ."[23] The Supreme Court held that since the contemplated merger would make it almost impossible for the FTC to frame an adequate cease and desist order, a court of appeals would therefore be deprived of jurisdiction to effectively review the Commission's final determination. Therefore, the Court found it appropriate for the court of appeals to protect its judisdiction by issuing a preliminary injunction under the All Writs Act preserving the status quo until the FTC completed its hearing.

Both the majority and the dissent agree that the All Writs Act can be used when there has not yet been a perfected appeal, but do not agree as to the extension of the concept of potential jurisdiction to sustain the use of the All Writs Act. The dissent sees the concept of potential jurisdiction limited to the area of past application where the lower courts have already assumed jurisdiction over a particular case and the court of appeals has issued a writ to protect its review power over that case.[24] To the majority the instant case comes within the concept of potential jurisdiction. The Court reasoned that if the FTC decides that the merger is illegal the court of appeals will have jurisdiction to review this decision, but if the parties consummate their plans before a final determination the FTC will be unable to frame an effective cease and desist order, and the court of appeals will in turn be unable to effectively exercise its power of review. The Court thus held that under the All Writs Act the court of appeals can issue an injunction to maintain the status quo in order to protect its potential jurisdiction.

One issue that permeates both the majority and dissenting opinions is the interpretation and weight that should be given to the legislative history of the Clayton Act, and the reluctance of Congress to amend the Act in order to give to the FTC the power to either issue or to directly petition for preliminary injunctions. Mr. Justice Clark, writing for the majority, sees the lack of statutory authority in the original Clayton Act as not dispositive since the basis of his decision is not in the Clayton Act but in the All Writs Act. For similiar reasons Justice Clark considers the refusal of Congress to amend the Clayton Act as requested by the FTC as irrelevant. On the contrary, Justice Fortas interprets the absence of statutory authority in the Clayton Act for the FTC to petition for

22. 38 Stat. 736 (1914), 15 U.S.C. § 25 (1964).
23. 63 Stat. 102 (1949), 28 U.S.C. § 1651(a) (1964).
24. FTC v. Dean Foods Co., 384 U.S. 597, 625 (1966) (dissenting opinion). The dissent in reference to the cases cited by the majority states: "Each of them involved issuance of a writ to prevent action or inaction by a trial court which would otherwise mean that the case would not be adjudicated on its merits and therefore could not be reviewed on appeal."

preliminary injunctions in the area of section 7 enforcement as a categorical denial of this power to the Commission. He reasons that the FTC was intended to be an expert fact-finding agency and, therefore, is not to act as a litigation arm in enforcement.[25] This function is to be performed by the Attorney General of the United States pursuant to the provisions of the Clayton Act.[26]

The decision of the Court, as pointed out by the dissent, is not necessarily impelled. In reality it is strained in its technical relation to both precedent and statutory authorization. However, the Court's decision rests on considerations other than mere legal logic. Apparently, the majority of the Court feels it advantageous and necessary for the FTC to have this enforcement ability, and considers the prior use of the All Writs Act together with the fact that the FTC participates in other judicial proceedings as a substantial foundation for its holding.

Initially, it appears that the use of preliminary injunctions by the FTC may be expedient since companies can be prevented from merging in such a way that two viable entities will no longer exist. If such a merger were to take place a cease and desist order would in most cases be incapable of returning the industry to its pre-merger competitive balance. Potentially detrimental consequences can also be avoided during the interim period in which the injunction would require the status quo to be maintained.[27] Of course, if one considers mergers to be "per se" improper and illegal, the Court's decision is clearly a necessary one.[28] It might thus be concluded that the procedure adopted by the Court is almost universally beneficial.

There are, however, countervailing considerations. If a final decision is in the favor of the companies involved they will have lost the benefit of their merged status during the duration of the preliminary injunction, and as a consequence the competitive system may have lost the benefit of a merger that would in fact have increased competition.[29] In the present high pitched economic atmosphere a relatively short preliminary injunction can frustrate a proposed merger due to the change in economic conditions. In a case of this nature the company, its owners, and the national economy

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25. *Id.* at 635 (dissenting opinion).

26. See note 11 *supra.*

27. See Note, 79 HARV. L. REV. 391, 392 (1965).

28. Professor Cook intimates that this in fact is the disposition of the Supreme Court. Cook, *Merger Law and Big Business: A Look Ahead,* 40 N.Y.U.L. REV. 710, 712-15 (1965).

29. The decision of the FTC examiner in this case was exactly to that effect:
> The acquisition will not increase concentration in the sale and distribution of packaged milk in the Chicago Area or contribute to any over-all trend towards concentration in the sale and distribution of packaged milk in the United States. . . . The net effect of the acquisition, therefore, will be to contribute further to the already declining level of concentration in the Chicago Area and to establish the Chicago market as one of the least concentrated milk marketing areas in the country.

3 TRADE REG. REP. (1966 Trade Cas.) ¶ 17,682 (FTC Docket No. 8674, Sept. 12, 1966).

have each lost the possible long-range benefits merely on the FTC's finding that it is reasonably probable that it will find the proposed merger illegal. Because of the tremendous concern of business with mergers it is clear that the FTC's policy is a critical factor in corporate economics. With this in mind, the question presented is whether or not it is wise to eliminate the Attorney General from the procedure for attaining preliminary injunctions as provided under section 7 of the Clayton Act.[30] The mere fear that the FTC will use a shotgun approach in exercising this power is in itself a factor militating against corporate decisions to merge, notwithstanding what the actual policy of the FTC will be.[31]

Litigation in the federal courts of appeals on petitions for preliminary injunctions presents another difficulty resultant from the *Dean Foods* decision. Appellate dockets are already overburdened, and the addition of these cases will only increase this problem. It is difficult to forecast how many petitions for preliminary injunctions the FTC will file, but the strong desire of the FTC to have this power may be indicative of its intent to make full use of it. A correlative consequence of having a court of appeals hear such petitions is that the appellate courts are thus forced to assume the role of trial courts. Mr. Justice Fortas was most adamant in his criticism of this aspect of the majority's decision. He noted:

> It places an unwise, unjustified and disruptive burden on the courts of appeals and saddles them with original jurisdiction which they cannot properly exercise and a fact-finding function in elaborate, complex situations, which they should not be asked to undertake.[32]

He feels the courts structure is not adequately adaptable for this task in light of the critical fact issues in cases under section 7 of the Clayton Act.

In light of these considerations it is possible that the sagacity of the *Dean Foods* decision will lie in the difficulties it creates. Perhaps Congress, in face of this decision, may be motivated to re-evaluate the current enforcement procedures and to enact some definitive methods of enforcement that properly weigh the competing interests involved.

Walter John Taggart

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30. The FTC's impact on the over-all business community will be greatly increased by the decision of the Court in the *Dean Foods* case. This is due to the fact that the issuance of a preliminary injunction may have the practical effect of causing the corporations to cancel the merger. Many corporate officials in the face of the high costs of antitrust litigation, possible adverse public opinion and the adverse preliminary finding of the court of appeals will simply choose to abandon the merger entirely.

31. The following observation by an analyst is germane:

> Until it becomes clear exactly what impact the new procedure will have on antimerger enforcement, the Supreme Court's decision is bound to have a deterrent effect on companies contemplating mergers, since it clearly affects the risk they run. In the first place, some antitrust experts feel the decision will add to the competitive spirit that already prevails between the two enforcement agencies and may thereby produce more enforcement activity under Section 7.

BNA ANTITRUST & TRADE REG. REP. No. 267, August 23, 1966, at B-4.

32. FTC v. Dean Foods Co., 384 U.S. 597, 630 (1966) (dissenting opinion).

CONSTITUTIONAL LAW — DOUBLE JEOPARDY — STATE COURT HOLDS FIFTH AMENDMENT'S DOUBLE JEOPARDY PROVISION APPLICABLE TO THE STATES THROUGH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

People v. Ressler (N.Y. 1966)

Defendant was tried under an indictment charging second degree murder but was convicted of first degree manslaughter. The New York Supreme Court, Appellate Division, reversed judgment on the law and facts and ordered a new trial.[1] Following the granting of defendant's motion, the decision was amended to reverse solely on the law and a new trial was again ordered.[2] Cross appeals were taken to the New York Court of Appeals which affirmed on the merits and *held* that since defendant was tried on an indictment for murder in the second degree but was convicted on a lesser charge, the fifth and fourteenth amendments prohibit his retrial for the same criminal conduct on a more serious charge than manslaughter in the first degree. *People v. Ressler,* 17 N.Y. 2d 174, 216 N.E.2d 582, 269 N.Y.S.2d 414 (1966).

Unlike some other provisions of the Bill of Rights,[3] the double jeopardy clause of the fifth amendment has never been held by the United States Supreme Court to be applicable to the states through the fourteenth amendment.[4] Thus the federal courts have, for the most part, struggled with more immediate problems involving the interpretation and application of the double jeopardy clause.

One of the early issues concerned the relation between double jeopardy and the power of a court to grant a new trial following an acquittal or conviction. In *United States v. Gilbert,*[5] a federal court held that it had no power to grant a new trial following an acquittal or conviction where the first trial contained no irregularity which would constitute a mistrial. However, the *Gilbert* holding met with disfavor among other lower fed-

1. People v. Ressler, 24 A.D.2d 7, 261 N.Y.S.2d 823 (1965).

2. People v. Ressler, 24 A.D.2d 727, 262 N.Y.S.2d 1022 (1965).

3. See, *e.g.,* Miranda v. Arizona, 384 U.S. 436 (1966) (self-incrimination and right to counsel: fifth and sixth amendments); Griffin v. California, 380 U.S. 609 (1965) (self-incrimination: fifth amendment); Pointer v. Texas, 380 U.S. 400 (1965) (confrontation of witnesses: sixth amendment); Escobedo v. Illinois, 378 U.S. 478 (1964) (self-incrimination and right to counsel: fifth and sixth amendments); Malloy v. Hogan, 378 U.S. 1 (1964) (self-incrimination: fifth amendment); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel: sixth amendment); Mapp v. Ohio, 367 U.S. 643 (1961) (unreasonable search and seizure: fourth amendment).

4. When the double jeopardy provision was originally placed before the House of Representatives, a motion was made to insert after the words "same offense" the words "by any law of the United States." The motion failed, permitting speculation by negative inference that double jeopardy may have been intended to apply to the states as well as the federal government. Sigler, *A History of Double Jeopardy,* 7 AM. J. LEGAL HIST. 283, 305 (1963).

5. 25 Fed. Cas. 1287 (No. 15204) (C.C.D. Mass. 1834). Defendants had been found guilty of robbery, a capital offense, and moved for a new trial.

eral courts as exemplified by the decision in *United States v. Keen*,[6] in which the court held that a new trial could be granted on defendant's motion following a conviction, even though there was no error that would constitute a mistrial. In *United States v. Ball*,[7] the United States Supreme Court rejected another facet of the *Gilbert* holding by deciding that the double jeopardy provision did not preclude a second trial for the same offense, when a conviction for the offense had been set aside.

In 1846, the question of collateral concern in this note — whether the fifth amendment allows the reprosecution on the original indictment of a defendant who has been convicted of a crime of lesser penalty than charged in the indictment and who is successful on appeal — was answered in the affirmative by a lower federal court in *United States v. Harding*.[8] An issue quite similar to that in *Harding* was presented to the Supreme Court in *Trono v. United States*.[9] In *Trono*, the defendants had been indicted for murder and tried and convicted of assault. They appealed to the highest court of the Philippines which, having jurisdiction to review the case on both law and fact, entered a conviction of murder without remanding the case for retrial. The decision was then affirmed by the Supreme Court,[10] which did not consider this reprosecution issue again until *Green v. United States*.[11]

Green was indicted by a District of Columbia grand jury which returned an indictment containing two counts, one for arson and the other for first degree murder. Under the latter count, the jury was charged on first and second degree murder. The jury found Green guilty of second degree murder without returning a verdict on the first degree murder charge. Green successfully appealed,[12] but on remand was tried again for first degree murder and found guilty. He filed another appeal and the conviction was affirmed.[13] The Supreme Court reversed, reasoning that the reversal need not be premised exclusively on the assumption that the

6. 26 Fed. Cas. 686 (No. 15510) (C.C.D. Ind. 1839). The court said that to deny the defendant a new trial ". . . guarantees to him the right of being hung, to protect him from the danger of a second trial." *Id.* at 690.

7. 163 U.S. 662 (1896). However, the fifth amendment prohibits a subsequent prosecution for the same offense where the defendant has been acquitted of the offense, and a new trial cannot be had even though an acquittal may appear to be erroneous.

8. 26 Fed. Cas. 131 (No. 15301) (C.C.E.D. Pa. 1846). One defendant had been found guilty of murder, and two defendants convicted of manslaughter.

9. 199 U.S. 521 (1905).

10. The Court went further than in United States v. Ball, 163 U.S. 662 (1896), by holding that upon the successful appeal of the lesser offense, the defendant not only waives the right not to be tried again for the offense for which he has been once convicted, but also waives the right to plead once in jeopardy as to that part of the judgment which acquitted him of the higher offense. Mr. Justice McKenna, dissenting in Trono v. United States, 199 U.S. 521, 539 (1905), stated that the United States freely affords means of review of erroneous rulings and judgments, and does not require for their exercise the forfeiture of constitutional rights. Mr. Justice Holmes, dissenting in Kepner v. United States, 195 U.S. 100, 134 (1904), adopted a "continuing jeopardy" theory to justify such reprosecutions. Under this theory jeopardy attaches only after a final unappealable judgment has been rendered.

11. 355 U.S. 184 (1957).

12. 218 F.2d 856 (D.C. Cir. 1955).

13. 236 F.2d 708 (D.C. Cir. 1956).

silence of the jury on the first degree murder charge was an implicit acquittal of Green on that charge,[14] but that under the subject circumstances (the jury was dismissed without Green's consent, and without returning any express verdict on the first degree murder charge after being given a full opportunity to do so) Green's jeopardy for first degree murder came to an end when the jury was discharged and he could not be retried for that offense.[15] In rejecting the classic theories allowing reprosecution relied on by the Government,[16] the Court confined *Trono* to its peculiar setting and held it not to be controlling since its doctrine "would unduly impair the constitutional prohibition against double jeopardy."[17] Accordingly, in establishing the federal standard for double jeopardy, the Court held that where a defendant, tried in a federal court and convicted of a lesser included crime than charged, overturns his conviction, the fifth amendment prohibits reprosecution for the greater crime even though the jury, in the original trial, did not return a formal verdict of acquittal for the greater crime but remained silent as to it.[18]

While the interpretation of the fifth amendment's double jeopardy provision was evolving, a similar evolution was taking place in regard to whether the due process clause of the fourteenth amendment embodied any double jeopardy limitations. The Court initially avoided the question of whether the power of the states to reprosecute was restricted in anyway by the fourteenth amendment by holding that under particular cir-

14. 355 U.S. at 188.

15. *Id.* at 190–91. The Court cited as authority Wade v. Hunter, 336 U.S. 684 (1949), which held that the trial judge's premature termination of a trial before a verdict is rendered does not bar a second trial on the same charge when such an act is necessary to satisfy the ends of justice. See United States v. Perez, 22 U.S. 579 (1824); *but cf.* Downum v. United States, 372 U.S. 734 (1962) (jury discharged over defendant's objection because prosecution's key witness not present). See generally Comment, *Double Jeopardy Its History, Rationale and Future*, 70 DICK. L. REV. 377, 390–93 (1966); Note, *Double Jeopardy: The Reprosecution Problem*, 77 HARV. L. REV. 1272, 1276–81 (1964).

A recent Pennsylvania Supreme Court decision, Commonwealth *ex rel.* Montgomery v. Myers, 422 Pa. 180, 220 A.2d 859 (1966), held that a defendant whose motion for mistrial was granted on the basis of the prosecutor's prejudicial summation, could be retried for murder without violating either the double jeopardy provision of the state constitution or the fifth amendment of the federal constitution. However, the court restricted its doctrine to situations where the prosecutor's conduct is not calculated to stop a "losing trial," and the burden on the accused of being subjected to a new trial is clearly outweighed by the interest of society in convicting the guilty. In addition, the court distinguished *Downum v. United States, supra*, on the ground that in *Downum* the jury was discharged over the defendant's objection. Commonwealth *ex rel.* Montgomery v. Myers, *supra* at 193–94, 220 A.2d at 866.

16. 355 U.S. at 194–95. See note 10 *supra*. The Pennsylvania Supreme Court also rejected the waiver theory, but stated that the fact that the defendant moved for a mistrial is a factor to be considered on whether double jeopardy should be applied. Commonwealth *ex rel.* Montgomery v. Myers, *supra* note 15, at 189–90, 220 A.2d at 864–65.

17. 355 U.S. at 197. In footnote 16 at 197 of the Court's opinion, it is stated that the remarks made by Mr. Justice Peckham in the *Trono* opinion, that he regarded the statutory provision as having the same effect as the fifth amendment, was not essential to the decision and, therefore, even if the full court had accepted them, they would not be decisive in this case where the interpretation of the fifth amendment is necessarily decisive.

18. 355 U.S. at 184. Justice Frankfurter, in his dissenting opinion, gives the history of the double jeopardy provision of the fifth amendment. *Id.* at 198.

cumstances the fifth amendment was not violated and, therefore, it was not necessary to reach the fourteenth amendment issue.[19] However, the Court in *Palko v. Connecticut*[20] was unable to use this method of avoidance. In *Palko,* the defendant was prosecuted by the state under an indictment for first degree murder but was convicted of murder in the second degree. In exercising its statutory right,[21] the state successfully appealed and the judgment was reversed and a new trial ordered.[22] At the second trial, the defendant was convicted of first degree murder and sentenced to death despite his contention that the right conferred by the Connecticut statute placed him in double jeopardy. The Supreme Court held that the reprosecution did not violate the defendant's constitutional rights under the fourteenth amendment,[23] even though it was assumed that the fifth amendment would have dictated a different result.[24] Although the Court indicated that the due process clause might bar a state reprosecution in less meritorious circumstances,[25] it was not until *Bartkus v. Illinois,*[26] and Mr. Justice Frankfurter's concurring opinion in *Louisiana ex rel. Francis V. Resweber,*[27] that it was clearly articulated that the due process clause possesses some double jeopardy limitations.

The next question, and the question which faced the court in the instant case, concerns the extent of the double jeopardy limitations imposed by the due process clause on the states. In *United States ex rel. Hetenyi v. Wilkins,*[28] the case on which the *Ressler* court based its decision, a federal court held for the first time that a state reprosecution transgressed federal constitutional limitations. In *Hetenyi,* the defendant was indicted by a New York grand jury for first degree murder but was con-

19. Keerl v. Montana, 213 U.S. 135 (1909); Dreyer v. Illinois, 187 U.S. 71 (1902).

20. 302 U.S. 319 (1937).

21. CONN. GEN. STAT. REV. § 6494 (1930) (now CONN. GEN. STAT. ANN. § 54-96 (1960)).

22. State v. Palko, 121 Conn. 669, 186 Atl. 657 (1936).

23. Mr. Justice Cardozo, writing for the Court, posed the following question: "Is that kind of double jeopardy to which the statute has subjected him a hardship so acute and shocking that our polity will not endure it? Does it violate those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'? . . . The answer surely must be no." 302 U.S. at 328.

24. *Id.* at 322-23.

25. "What the answer would have to be if the state were permitted after a trial free from error to try the accused over again or to bring another case against him, we have no occasion to consider." *Id.* at 328. See generally Fisher, *Double Jeopardy, Two Sovereignties and the Intruding Constitution,* 28 U. CHI. L. REV. 591, 595-97 (1961).

26. 359 U.S. 121 (1959). A state reprosecution was held permissible following an acquittal in a federal prosecution for the same conduct, but the court's opinion indicated that the fourteenth amendment's due process clause would bar a reprosecution by the same sovereignty. In a dissenting opinion, Justice Black held that the fifth amendment bars a federal trial following either a state acquittal or conviction, and whether or not the double jeopardy clause of the fifth amendment is as binding on the states as on the federal government, the state reprosecution of Bartkus violated the fourteenth amendment standards expressed in *Palko. Id.* at 150.

27. 329 U.S. 459, 466 (1947) (concurring opinion of Frankfurter, J.). See United States *ex rel.* Hetenyi v. Wilkins, 348 F.2d 844 (2d Cir.), *cert. denied,* 383 U.S. 913 (1965), for the "double jeopardy history" of the due process clause.

28. 348 F.2d 844 (2d Cir.), *cert. denied,* 383 U.S. 913 (1965). See 46 B.U.L. REV. 260 (1966); 40 ST. JOHN'S L. REV. 292 (1966).

victed of murder in the second degree. On appeal, the New York Supreme Court reversed the conviction and ordered a new trial.[29] Tried again under the original indictment, Hetenyi was found guilty of first degree murder. Again, the conviction was reversed on appeal.[30] For the third time, Hetenyi was indicted for first degree murder and once again convicted of murder in the second degree.[31] His application for a writ of habeas corpus was denied by the federal district court[32] and on appeal from the denial to the circuit court, it was held that the reprosecution for first degree murder overstepped the limitations that the due process clause places on the states notwithstanding that the defendant was twice successful on appeals, and even though the third trial, as the first, resulted in a conviction of second degree murder.[33]

The court's reasoning in *Hetenyi* is premised on the proposition that the due process clause of the fourteenth amendment places some limitations on a state's power to reprosecute a defendant for the same crime.[34] Three possible standards are proposed for determining when a state reprosecution violates due process under the fourteenth amendment: (1) the federal standard which assumes that the double jeopardy provision of the fifth amendment would be absorbed in toto by the fourteenth amendment under the doctrine of selective incorporation;[35] (2) the "basic core" standard which assumes that not all of the fifth amendment double jeopardy standards will be imposed on the states but only those constituting the "basic core" of the amendment through a restricted use of the doctrine of selective incorporation;[36] and (3) the fundamental fairness test which is unrelated to the doctrine of selective incorporation and, in effect, rejects that doctrine favoring a qualified inquiry into the state

29. People v. Hetenyi, 277 App. Div. 310, 98 N.Y.S.2d 990, *aff'd* 301 N.Y. 757, 95 N.E.2d 819 (1950).

30. People v. Hetenyi, 304 N.Y. 80, 106 N.E.2d 20 (1952) (reversal was due to an improper remark of the district attorney).

31. *Aff'd per curiam*, 282 App. Div. 1008, 125 N.Y.S.2d 689 (1953).

32. United States *ex rel.* Hetenyi v. Wilkins, 227 F. Supp. 460 (W.D.N.Y. 1964). Certiorari had previously been denied by the United States Supreme Court, 375 U.S. 980 (1964).

33. 348 F.2d at 861–62. The court held that to the extent that §§ 464 and 544 of the New York Code of Criminal Procedure provide for such a reprosecution they are inconsistent with due process under the fourteenth amendment. *Id.* at 863. N.Y. CODE CRIM. PROC. § 464 provides:

> The granting of a new trial places the parties in the same position as if no trial had been had. All the testimony must be produced anew; and the former verdict cannot be used or referred to either in evidence or in argument.

§ 544 provides:

> When a new trial is ordered, it shall proceed in all respects as if no trial had been had.

34. *Id.* at 849. See notes 26 and 27 *supra* and accompanying text.

35. *Id.* at 855. Under the doctrine of selective incorporation, certain provisions of the Bill of Rights are absorbed by the fourteenth amendment and thereby made applicable to the states. Henkin, *"Selective Incorporation" in the Fourteenth Amendment*, 73 YALE L.J. 74 (1963).

36. The court admits that there is a serious question whether the doctrine of selective incorporation permits two levels of selection which process it describes as: ". . . absorption of only those provisions of the Bill of Rights that are fundamental, and then absorption of only that part of the provision that is fundamental, its basic core." 348 F.2d at 854.

reprosecution to determine if it is so fundamentally unfair as to violate elemental due process.[37]

The circuit court avoided choosing any particular standard on which to rest the decision, but ruled that the reprosecution, under the given circumstances, had exceeded the federal constitutional limitations on a state's power to reprosecute under all three standards. *Green v. United States*[38] was used to illustrate both the federal and "basic core" standards since "*Green* involved more than a 'subtle technical controversy' and the decision rested on that aspect of the fifth amendment's double jeopardy provision that must be ranked as fundamental."[39] The *Palko v. Connecticut*[40] test, adopted to determine whether the reprosecution was fundamentally unfair, dictated that since no "legitimate societal interest" existed which would outweigh the hardships that a reprosecution would have on the accused, such reprosecution was impermissable.[41]

The court in the instant case placed heavy reliance on *Hetenyi* to justify the reversal of New York precedents [42] and to propose that its doctrine is the law of the land. Judge Van Voorhis reasoned that the previously existing New York rule could co-exist with the federal rule established by *Green* so long as the double jeopardy clause of the fifth amendment was not mandated on the states by the fourteenth amendment. But, expounded Judge Van Voorhis, since *Hetenyi* holds that the due process clause of the fourteenth amendment imposes the rule of *Green* upon the states, to reprosecute the defendant for second degree murder would place him in jeopardy twice.[43]

The court, after discussing the *Hetenyi* decision, ruled that:

> The holding [in *Ressler*] is not necessarily that the entire Fifth Amendment is mandated on the States, but does extend to a determination that the situation here presented falls within the guarantee against double jeopardy which was held to be a fundamental right within the doctrine of selective incorporation, whereby certain guar-

37. *Id.* at 855.

38. 355 U.S. 184 (1957).

39. 348 F.2d at 856, referring to 355 U.S. at 198.

40. 302 U.S. 319, 328 (1937). See note 23 *supra.*

41. 348 F.2d at 858. The court distinguishes the reprosecution in *Palko* from the case before it on the ground that in *Palko* the reprosecution was allowed because the state had been prejudiced by substantial legal error in failing to get a conviction for the higher charge, but in *Hetenyi* the state simply failed to convict the defendant of the higher crime. *Id.* at 860. See note 25 *supra.*

42. Under §§ 464 and 544 of the N.Y. CODE CRIM. PROC., the New York courts have held that if the defendant successfully appealed his conviction of the lesser degree of a crime stated in the indictment, he could still be convicted of the greater degree. Matter of Fiorillo v. Farrell, 16 N.Y.2d 678, 209 N.E.2d 290, 261 N.Y.S.2d 300 (1965); People v. Ercole, 4 N.Y.2d 617, 152 N.E.2d 7, 176 N.Y.S.2d 649 (1958). But if the defendant does not appeal or is not successful on appeal he cannot be retried for the greater charge. In this situation the jury's silence on the greater charge is held to be equivalent of a verdict of not guilty of that charge. People v. McCarthy, 110 N.Y. 309, 314, 18 N.E. 128, 129 (1888).

43. People v. Ressler, 17 N.Y.2d 174, 180, 216 N.E.2d 582, 585, 269 N.Y.S.2d 414, 417 (1966).

> antees of the Bill of Rights are absorbed by the due process clause of the Fourteenth Amendment and are thus made applicable to the States.[44]

Moreover, although the denial of certiorari[45] by the Supreme Court in the *Hetenyi* case does not indicate approval of that decision, the court indicated that the cogency of the Second Circuit's reasoning, in addition to recent Supreme Court decisions[46] in related areas, demonstrate that *Hetenyi* is the law of the land.[47] Judge Scileppi, concurring and dissenting in part, urged against the reversal of prior New York law stating that he was unpersuaded that *Hetenyi* represents the current Supreme Court position on double jeopardy.[48]

Ressler appears to carry *Hetenyi* beyond the strict holding of that case by deciding that the doctrine of selective incorporation applies to the double jeopardy provision of the fifth amendment, since the court in *Hetenyi* ruled that the reprosecution would be violative of the fourteenth amendment's due process clause without reference to the fifth amendment and declined to unequivocally adopt the position taken by the New York court. Also, it is not clear from the court's opinion in *Ressler* whether the fifth amendment's double jeopardy provision is absorbed in toto by the due process clause, or whether it is just the "basic core" of that provision.

The issue of whether the fifth amendment's double jeopardy provision is applicable to state court proceedings under the due process clause was recently presented to the Supreme Court in *Cichos v. Indiana* on a writ of certiorari. The issue was never reached, however, since the Court after first granting the writ later dismissed it as improvidently granted.[49] In *Cichos,* the petitioner was tried in a lower state court of Indiana under a

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44. *Id.* at 180, 216 N.E.2d at 585; 269 N.Y.S.2d at 417.

45. 383 U.S. 913 (1965).

46. Pointer v. Texas, 380 U.S. 400 (1965); Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964); Malloy v. Hogan, 378 U.S. 1 (1964). See note 3 *supra.*

47. 17 N.Y.2d at 181, 216 N.E.2d at 585, 269 N.Y.S.2d at 417 (1966). Concurring in the result in *Ressler,* Judge Burke rejects the holding that the double jeopardy provision of the fifth amendment is applicable to the states, saying that such a reprosecution would violate the protection afforded the defendant by the New York state constitution (art. 1, § 6), and that the result is called for ". . . as a natural development in the quality of justice now accorded to the accused in this state." People v. Ressler, *supra* at 181–82, 216 N.E.2d at 585–86, 269 N.Y.S.2d at 418 (concurring opinion).

48. Citing Palko v. Connecticut, 302 U.S. 319 (1937) and Brantley v. Georgia, 217 U.S. 284 (1910). The *Hetenyi* court, in applying the federal standard and "basic core" tests, holds that whatever precedential value *Palko* had was vitiated by Green v. United States, 355 U.S. 184 (1957), and that although footnote 15 of the *Green* opinion states that *Brantley* is not controlling since it involved a state trial, this was done to distinguish *Brantley,* not approve of it. Under the fundamental fairness test, *Brantley* was ruled not controlling, since it was decided under the spirit generated by Trono v. United States, 199 U.S. 521 (1905) which was diminished as authority by *Green.* And finally, even if *Brantley* is interpreted as holding that reprosecution for the higher offense is not so fundamentally unfair as to transgress the due process limitations of the fourteenth amendment, the evolution of contemporary constitutional standards of justice and fairness would require not following it. 348 F.2d at 861–63.

49. Cichos v. Indiana, 385 U.S. 76 (1966).

two-count affidavit charging him with reckless homicide and involuntary manslaughter, and was convicted of reckless homicide. The verdict made no mention of the involuntary manslaughter charge. On appeal, the Supreme Court of Indiana granted a new trial.[50] The petitioner was retried on both counts, and again convicted of reckless homicide and sentenced to one to five years imprisonment. The jury, once again, remained silent as to the involuntary manslaughter charge. The Supreme Court of Indiana[51] affirmed the conviction and rejected petitioner's argument that his retrial on the involuntary manslaughter count subjected him to double jeopardy in violation of the fifth amendment.

In dismissing the writ of certiorari as improvidently granted, the Court indicated approval of the Supreme Court of Indiana's holding that the offenses of reckless homicide and involuntary manslaughter are statutorily[52] treated as one offense with different penalties as opposed to possibly viewing reckless homicide as an included offense in involuntary manslaughter. Therefore, no logical mandate exists to necessarily treat the jury's silence in regard to the involuntary manslaughter charge as an acquittal of that offense, but rather, the better reasoning would be to hold that reckless homicide encompasses the elements of involuntary manslaughter and petitioner was merely given the lesser penalty.[53] In a concurring opinion, Mr. Justice Black adhered to his earlier views stated in *Bartkus v. Illinois*[54] that, "the Fourteenth Amendment makes the double jeopardy provision of the Fifth Amendment applicable to the States."[55] Mr. Justice Fortas, with whom the Chief Justice and Mr. Justice Douglas joined, dissented on the ground that the fourteenth amendment's due process provision should be interpreted to prohibit the state's reprosecution of the petitioner, reasoning that if *Cichos* were a federal case the reprosecution would have violated the federal standard enunciated in *Green*.[56]

Thus, whether the New York court has correctly divined[57] the current position of the Supreme Court is for the present unresolved, and

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50. 243 Ind. 187, 184 N.E.2d 1 (1962).
51. 208 N.E.2d 685 (1965).
52. IND. ANN. STAT. § 47-2002 (1965). The statutory penalty for involuntary manslaughter is two to twenty-one years imprisonment whereas the penalty for reckless homicide is one to five years imprisonment. IND. ANN. STAT. § 10-3405 (1965) (involuntary manslaughter); IND. ANN. STAT. § 47-2001(a) (1965) (reckless homicide).
53. Cichos v. Indiana, 385 U.S. 76 (1966).
54. 359 U.S. 121, 150 (1959) (dissenting opinion).
55. Cichos v. Indiana, 385 U.S. 76 (1966). In his dissenting opinion in Adamson v. California, 332 U.S. 46, 68 (1947), Mr. Justice Black states that the original purpose of the fourteenth amendment was to make the Bill of Rights applicable to the states.
56. 332 U.S. at 80.
57. In Commonwealth *ex rel.* Montgomery v. Myers, 422 Pa. 180, 220 A.2d 859 (1966), the Pennsylvania court avoided anticipating the Court's answer on the question of whether or not the fifth amendment's double jeopardy provision is mandated on the states, by stating that, even if it were, no transgression occurred under the circumstances there present. *But see* State v. Farmer, 48 N.J. 145, 224 A.2d 481 (1966) (dictum).

what tack the Court will eventually take on the double jeopardy issue is still uncertain. The Court could avoid overruling its decision in *Palko* by using the fundamental fairness test coupled with "basic core" standards.[58] However, if the Court chooses to employ the doctrine of selective incorporation, all of the rights afforded by the double jeopardy clause would pass to defendants in state prosecutions.[59] If so, the Court would invoke the federal standard and *Palko* would fall.[60]

Harry Sam Himes

CONSTITUTIONAL LAW — DUE PROCESS — PROSECUTION'S NEGLIGENT NONDISCLOSURE OF CREDIBILITY EVIDENCE REQUIRES REVERSAL IF ITS INTRODUCTION WOULD HAVE ALLOWED TRIER OF FACT TO ENTERTAIN A REASONABLE DOUBT.

Levin v. Katzenbach (D.C. Cir. 1966)

Appellant was charged with grand larceny on an indictment alleging a conspiracy to effect the corrupt acquittal of a union official being tried for perjury. He allegedly retained union funds given to him for use in "fixing" the official's trial. Following his conviction for grand larceny[1] and a subsequent affirmance by the United States Court of Appeals for the District of Columbia Circuit,[2] appellant filed the present petition for habeas corpus or a new trial, alleging that he had recently discovered evidence that had been in the government's possession at time of trial but was not disclosed to the jury.[3]

58. The Court could reason that to deprive an individual of a right which is fundamental to a provision in the Bill of Rights, would violate the fundamental fairness test established in *Palko*. Note, 46 B.U.L. REV. 260, 266 n.34 (1966). See notes 23 and 36 *supra* and accompanying text.

59. Henkin, *supra* note 35, at 79.

60. Adoption of the federal standard would mean that the fifth amendment's double jeopardy clause would be applied to the states in toto. Such a position would be incompatible with *Palko*, which held that under some circumstances, the double jeopardy standards that are applicable under the fifth amendment are not applicable to the states. 46 B.U.L. REV. 260 (1966).

1. At the trial, the testimony of government witnesses was inconsistent as to the alleged time when the money was given to the appellant and subsequently exchanged for bills of a smaller denomination. The contradictions and inconsistencies in the testimony were primary factors in appellant's defense.

2. Levin v. United States, 338 F.2d 265 (D.C. Cir. 1964), *cert. denied*, 379 U.S. 999 (1965).

3. The newly discovered evidence included a statement obtained prior to the trial from a bank officer, revealing that while he recalled cashing the union's check for

The district court dismissed the petition, concluding as a matter of law that: "Petitioner has failed to prove his allegation that trial counsel deliberately suppressed evidence."[4] Appealing from the dismissal, appellant urged that the district court erred by limiting itself solely to a consideration of the question of deliberate suppression. The United States Court of Appeals for the District of Columbia Circuit, Judge Burger dissenting, reversed and remanded, *holding* that the appellant was entitled to relief if the prosecution had failed to disclose evidence, which in the context of the case, might have allowed the jury to entertain a reasonable doubt about appellant's guilt. Characterizing such a failure to disclose as negligence, the court directed that on remand the district court should conduct a hearing to determine whether the government was negligent within this standard and to grant or deny appellant's writ in accordance with its determination. *Levin v. Katzenbach,* 363 F.2d 287 (D.C. Cir. 1966).

The activities of a prosecuting attorney which will vitiate a criminal conviction have ranged from the deliberate use of perjured testimony,[5] or the failure to correct testimony known to be false,[6] to the intentional suppression of exculpatory evidence.[7] While the issue confronting the court in the instant case was one concerning the negligent suppression of evidence, the principles relied on to condemn such suppression may be traced to the earlier development of the prosecutor's duty to refrain from soliciting or condoning perjured testimony.

In *Mooney v. Holohan,*[8] the United States Supreme Court recognized that the deliberate use of perjured testimony by the prosecution comprised state action inconsistent with the fundamental demands of justice and violative of the fourteenth amendment. The *Mooney* rationale was subsequently extended to unsolicited false testimony which was allowed to pass uncorrected,[9] as well as testimony relevant only to the defendant's sentence.[10] In addition to providing the basis for the exclusion of perjured testimony, *Mooney* also proved to be the foundation upon which later courts protected an accused from the injustice inherent in the prosecution's deliberate suppression of exculpatory evidence. This development

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$35,000 in one thousand dollar bills he had no recollection of a later exchange of these bills for bills of a smaller denomination. (This statement could have been of importance in challenging the credibility of the government witnesses.) The prosecution never called this officer as a witness at the trial, and appellant's attorney was never informed of the contents of the statement.

4. Levin v. Katzenbach, 249 F. Supp. 225, 229 (D.D.C. 1965).

5. Alcorta v. Texas, 355 U.S. 28 (1957); Pyle v. Kansas, 317 U.S. 213 (1942); Mooney v. Holohan, 294 U.S. 103 (1935).

6. Napue v. Illinois, 360 U.S. 264 (1959).

7. United States *ex rel.* Almeida v. Baldi, 195 F.2d 815 (3d Cir. 1952), *cert. denied,* 345 U.S. 904 (1953).

8. 294 U.S. 103, 112-13 (1935).

9. Napue v. Illinois, 360 U.S. 264, 269 (1959).

10. Alcorta v. Texas, 355 U.S. 28 (1957).

was foreshadowed by the Court in *Pyle v. Kansas*[11] when it cited *Mooney* as authority in holding that a petitioner had been deprived of rights guaranteed by the federal constitution if ". . . his imprisonment resulted from perjured testimony, knowingly used by the State authorities to obtain his conviction, *and from the deliberate suppression by those same authorities of evidence favorable to him.*"[12] After *Pyle* it was but another step to decisions that the intentional withholding of evidence material to the issue of guilt or sentence would alone constitute a denial of due process.[13]

In 1963 the Supreme Court consolidated and adopted the reasoning behind this expansion of the prosecutor's duties to insure justice and fair play.[14] In *Brady v. Maryland,*[15] the Court expressed its opinion as follows:

> We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, *irrespective of the good faith or bad faith of the prosecution.*[16]

In so holding, the Court not only demanded disclosure of evidence favorable to the accused, but also noted that due process was violated whether or not the suppression was "the result of guile."[17] The Court expressly declared that the relief granted was not based on a desire to reprimand the prosecution for reprehensible conduct, but instead on a desire to avoid an unfair trial to the accused.[18]

The recent development of the prosecutor's duty to disclose evidence to the accused, formulated in terms of due process requirements, can also

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11. 317 U.S. 213 (1942).

12. *Id.* at 216. (Emphasis added.)

13. See United States *ex rel.* Thompson v. Dye, 221 F.2d 763 (3d Cir. 1955); United States *ex rel.* Almeida v. Baldi, 195 F.2d 815 (3d Cir. 1952).

14. See Berger v. United States, 295 U.S. 78 (1935), wherein Mr. Justice Sutherland discussed the complex duties of the prosecuting attorney:

> The United States attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor — indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Id. at 88.

15. 373 U.S. 83 (1963).

16. *Id.* at 87. (Emphasis added.)

17. *Id.* at 88.

18. *Id.* at 87; Compare the opinion written by Judge Friendly in Kyle v. United States, 297 F.2d 507 (1961), wherein he warns that the courts should not forget their role in protecting the integrity of the judicial system:

> Sometimes only a small showing of prejudice, or none, is demanded because that interest is reinforced by the necessity that "The administration of justice must not only be above reproach, it must also be beyond the suspicion of reproach," [People v. Savvides] and by the teaching of experience that mere admonitions are insufficient to prevent repetition of abuse. See Mapp v. Ohio, 367 U.S. 643, 650–53.

Id. at 514. (Footnotes modified.)

be realistically construed as a judicial effort to alleviate the inadequacies evident in present legislative provisions for discovery in criminal cases.[19] Following the Supreme Court's decision in *Jencks v. United States*,[20] in which the Court recognized the defendant's right to inspect written records containing statements made by two government witnesses to the Federal Bureau of Investigation, Congress passed the Jencks Act.[21] Evidently disturbed by what it considered "widespread misinterpretations and popular misunderstandings of the opinion in the Jencks case,"[22] Congress promulgated the Act to "protect individual rights during criminal prosecutions and to protect confidential information in the possession of the Government.[23] The legislation gave a rather limited discovery device to the accused, and denied any rights to discovery under the act until the witness had actually testified at the trial.[24]

Faced with these inadequacies in the accused's rights to discovery, the courts have approached the problem from another direction. Instead of enlarging the *accused's rights* of discovery, they enlarged the *prosecutor's duty* to disclose, and the instant case is an example of the difficulties inherent in such an approach to the problems of criminal discovery.

In *Levin*, the court was presented with the problem of negligent nondisclosure of evidence by the prosecution.[25] Because the evidence in question could have cast doubt on the credibility of testimony used to secure the appellant's conviction,[26] the court adopted the standard enunciated by the Supreme Court in *Griffin v. United States*[27] that relief should be granted if an appellate court should conclude that the jury could have "attached significance to the evidence favorable to the defendant had the evidence been before it."[28] Also, because it was not necessary to show any willful suppression by the prosecution,[29] the court reasoned that negligent nondisclosure of such evidence could be sufficiently detrimental to

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19. See Traynor, *Ground Lost And Found In Criminal Discovery*, 39 N.Y.U.L. REV. 228, 242–43 (1964).

20. 353 U.S. 657 (1957).

21. 18 U.S.C. § 3500 (1958).

22. S. REP. No. 981, 85th Cong., 1st Sess. 1862 (1957).

23. *Ibid.*

24. Subsection (a) of the act provides:
In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be subject to subpoena, discovery, or inspection *until said witness has testified on direct examination in the trial of the case.* [Emphasis added.]

25. The defense did not request divulgence of the information in question, and although the rule of *Brady* was formulated in terms of a request, subsequent decisions have shown that a request is not a prerequisite to the duty to disclose. *E.g.*, United States *ex rel.* Meers v. Wilkins, 326 F.2d 135, 137 (2d Cir. 1964).

26. See notes 1 and 3 *supra.*

27. 336 U.S. 704 (1949).

28. *Id.* at 709.

29. See United States v. Consolidated Laundries Corp., 291 F.2d 563 (2d Cir. 1961).

the accused to result in a denial of due process.[30] At this point, however, the court extended its decision by noting that this negligent nondisclosure could serve as the basis for relief, irrespective of the lack of diligence or competence of the defendant's trial counsel.[31] It is this reasoning that most troubled the dissent,[32] and justifiably so, for such an approach exemplifies the inherent confusion that can result when the basic rationale behind the due process qualifications of disclosure are ignored.

Although the early development of the duty to disclose evidence was colored by a desire to control the activities of the state and its prosecutor,[33] there should be little doubt that today the concern is for the possible denial of the accused's constitutional right to a fair trial.[34] The court recognizes that the due process clause does not demand a trial that is perfect in every respect, for the accused would not be entitled to relief if his counsel actually knew the facts in question,[35] or he was unable to show due diligence.[36] Realizing these limitations on the due process remedies, and the inadequate statutory procedures for discovery, the court unfortunately returns to an emphasis on the activities of the prosecutor[37] by stating that his negligent nondisclosure will vitiate the conviction even if the evidence could have been introduced to the court through another channel — the defendant's counsel.

Due process requires that an accused be assured a fair trial. To help insure this result, our system has placed certain burdens on the prosecution. However, it should not be forgotten that an additional method of insuring fairness has been guaranteed. This is the right to competent counsel.[38] If evidence is not introduced at trial because the accused does

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30. See Ashley v. Texas, 319 F.2d 80 (5th Cir. 1963).

31. The court expressed its position as follows:
But appellant's claim for relief *based upon a breach of the prosecutor's duty of disclosure* challenges the fairness, and therefore the validity, of the proceedings, and relief, either on a motion for a new trial or for habeas corpus, may not depend on whether more able, diligent or fortunate counsel might possibly have come upon the evidence on his own.
363 F.2d 287, 291 (D.C. Cir. 1966). (Emphasis added.)

32. Judge Burger vehemently asserted: "No court I know of has ever invalidated a conviction because of the prosecutor's nondisclosure of evidence when the evidence was equally available to the accused." *Id.* at 293.

33. See Kyle v. United States, 297 F.2d 507 (2d Cir. 1961); Note, *The Prosecutor's Constitutional Duty to Reveal Evidence to the Defendant*, 74 YALE L.J. 136 (1964).

34. See notes 17 and 18 *supra.*

35. 363 F.2d 287, 291 n.11 (D.C. Cir. 1961).

36. To obtain a new trial because of newly discovered evidence (1) the evidence must have been discovered since the trial; (2) the party seeking the new trial must show diligence in the attempt to procure the newly discovered evidence; (3) the evidence relied on must not be merely cumulative or impeaching; (4) it must be material to the issues involved; and (5) of such nature that in a new trial it would probably produce an acquittal.
Thompson v. United States, 188 F.2d 652, 653 (D.C. Cir. 1951).

37. See note 31 *supra.*

38. The court notes the fact that the accused's trial counsel actually interviewed the bank official in an effort to discover whether the bank kept numbers of their $1,000

not have adequate counsel, then this inadequacy of representation should be recognized as the basis for concluding that the accused has not received a trial that meets the standards of due process. Being seemingly reluctant to consider this approach to the problem, and realizing that the accused's statutory right to obtain evidence was woefully limited,[39] the court granted relief by placing an unreasonably heavy burden of disclosure on the prosecution. In doing so, it is suggested that *Levin* has saddled the prosecutor with the unrealistic burden of exploring his entire depository of trial preparation for information possibly useful to the accused.

In this exploration, the prosecutor will be "guided" by a standard requiring the disclosure of "evidence which, in the context of this case, might have led the jury to entertain a reasonable doubt about appellant's guilt."[40] Herein is found the predicament now visited upon prosecutors. He may exercise all the diligence and ingenuity his abilities and principles can muster and still be found "negligent" if a reviewing court feels that some evidence in his possession "might" have led the trier of fact to entertain a reasonable doubt of the defendant's guilt.[41] The prosecutor's duty, as defined by *Levin,* is made all the more burdensome by withholding from him the right to assume that the accused will have adequate representation.[42]

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bills. However, when counsel learned of the alleged exchange of the $1,000 bills for twenties, he failed to further question the official and hence was unaware of the latter's lack of recollection of this subsequent exchange. In commenting on these circumstances in his dissenting opinion, Judge Burger noted:

> In short, if the prosecution can be called "negligent" for not telling the defense what McCeney had said, what are we to say of defense counsel's conduct in not ascertaining the same facts from McCeney when he interviewed him?
>
> I suggest that the majority holding is a thinly disguised holding that defense counsel gave Appellant ineffective assistance in failing to call McCeney as a witness, and in the future I shall regard this case as holding nothing more than that.

363 F.2d 287, 295 (D.C. Cir. 1966).

39. See note 24 *supra.*

40. 363 F.2d 287, 291 (D.C. Cir. 1966).

41. The difficulties of measuring up to this standard are exemplified by Judge Burger's closing comment in his dissenting opinion:

> Had I been the prosecutor here, I confess that nothing in my 30 years' experience in litigation would have alerted me to any need or "duty" to call up opposing counsel and compare notes with him on whether the particular witness had told both litigants the same facts.

363 F.2d 287, 296 (D.C. Cir. 1966).

42. Although a comprehensive system of criminal discovery analogous to that afforded by the Federal Rules of Civil Procedure in civil litigation, would undoubtedly be a more realistic approach to the problem of discovery and disclosure than a case by case interpretation of the rights and duties involved, the Supreme Court at present has granted certiorari on a case that could prove an appropriate vehicle for a consideration of these problems in anticipation of the more desirable approach of a system of comprehensive rules. See State v. Giles, 239 Md. 458, 212 A.2d 101 (1965), *cert. granted,* 383 U.S. 941 (1966). See generally Traynor, *Ground Lost and Found in Criminal Discovery,* 39 N.Y.U.L. REV. 226 (1964).

CONSTITUTIONAL LAW — LOYALTY OATHS — A STATE LOYALTY OATH STATUTE WHICH FAILS TO REQUIRE, AS PART OF THE MEMBERSHIP CLAUSE, SPECIFIC INTENT TO FURTHER THE ILLEGAL ENDS OF THE PROSCRIBED ORGANIZATIONS IS UNCONSTITUTIONAL.

Elfbrandt v. Russell (U.S. 1966)

As a prerequisite to state employment, an Arizona statute required that all public officers and employees subscribe to a loyalty oath.[1] The oath was supplemented by a provision which subjected to a perjury prosecution those taking the oath who knowingly become or remain members of a subversive organization having knowledge of the unlawful purpose of the organization.[2] Petitioner, a school teacher and a Quaker, alleging the statute to be unconstitutional, objected to subscribing to the oath and brought an action for declaratory relief. The Arizona Supreme Court upheld the oath and accompanying statutory gloss.[3] The Supreme Court of the United States vacated the judgment and remanded the case for reconsideration in the light of *Baggett v. Bullitt,* 377 U.S. 360 (1964).[4] On reconsideration the Supreme Court of Arizona reinstated the original judgment.[5] Certiorari was granted and the United States Supreme Court reversed, *holding,* in a five–four decision, the statute unconstitutional for failure to require, as part of the membership clause, specific intent to further the illegal ends of the proscribed organizations. *Elfbrandt v. Russell,* 384 U.S. 11 (1966).

Following World War II and during the ensuing cold war, numerous state legislatures, aspiring to enhance and preserve security, have enacted

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1. I do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution and laws of the State of Arizona; that I will bear true faith and allegiance to the same, and defend them against all enemies, foreign and domestic, and that I will faithfully and impartially discharge the duties of the office of (name of office) according to the best of my ability, so help me God (or so do I affirm). (signature of officer or employee.)
ARIZ. REV. STAT. ANN. § 38-231(G) (Supp. 1965).

2. ARIZ. REV. STAT. ANN. § 38-231(E) (Supp. 1965). Subdivision E provides in pertinent part:

> Any officer or employee . . . having taken the form of oath or affirmation prescribed by this section, and . . . [who] during such term of office or employment knowingly and wilfully becomes or remains a member of the communist party of the United States or its successors or any of its subordinate organizations or any other organization having for one of its purposes the overthrow by force or violence of the government of the state of Arizona . . . [having] knowledge of [the] . . . unlawful purpose of [the] . . . organization . . . shall be . . . subject to all the penalties for perjury. . . .

For the purposes of the above section, the term officer or employee means every employee of the state or of any local government within the state. See ARIZ. REV. STAT. ANN. § 38-231(B) (Supp. 1965). Throughout this note, the term "subversive organization" will refer to one which advocates the overthrow by force or violence of the government of the state or any of its political subdivisions.

3. Elfbrandt v. Russell, 94 Ariz. 1, 381 P.2d 554 (1963).

4. Elfbrandt v. Russell, 378 U.S. 127 (1964). In *Baggett,* two loyalty oaths of the state of Washington were struck down as unconstitutionally vague.

5. Elfbrandt v. Russell, 97 Ariz. 140, 397 P.2d 944 (1964). The Arizona Supreme Court asserted that the Arizona statute was not afflicted with the uncertainties which characterized the Washington oaths.

loyalty oath statutes designed to ensure loyalty in public employees by excluding from public employment those unwilling to swear to non-membership in a subversive organization.[6] The Arizona statute is, in many ways, typical of those which have been before the Supreme Court in the past one and one-half decades.[7]

The Court in *Elfbrandt,* however, advanced a new and significant proposition by holding that a state loyalty oath statute which proscribes "mere knowing membership [in a subversive organization], without any showing of *'specific intent'* [of assisting in achieving the unlawful ends of the organization], would run afoul of the Constitution. . . ."[8] To sustain the validity of the newly formulated "specific intent" test, the majority cited *Aptheker v. Secretary of State,*[9] *Noto v. United States,*[10] and *Scales v. United States.*[11]

Mr. Justice White, dissenting, asserted that neither the "specific intent" test nor the cases cited by the majority to sustain the validity of the test was applicable to the instant issue.[12] The reasoning of the dissent is depicted in the following triparte analysis: (1) a state may condition public employment upon employee abstention from knowing membership in a subversive organization;[13] (2) one obtaining public employment by falsifying his qualifications may be subject to a perjury prosecution;[14] (3) therefore, a state loyalty oath statute is constitutional which proscribes knowing membership in a subversive organization providing criminal sanctions for those who swear falsely regarding their loyalty.[15] Underpinning Mr. Justice White's position is the case of *Adler v. Board of*

6. The enactment of such legislation has been traditional in times of great stress. During the Reconstruction period after the Civil War a wealth of statutes were passed both by the states and Congress requiring oaths of past loyalty of adherents of the Confederate cause. In litigation following this legislation the Supreme Court condemned the challenged oaths as both *ex post facto* laws and as bills of attainder. Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1867); *Ex parte* Garland, 71 U.S. (4 Wall.) 333 (1867). While restrictions on speech and association were imposed during and after World War I, there was a distinct absence of loyalty oaths.

7. It should be noted that specific criminal sanctions were not embodied within the early loyalty oath statutes during this period; however, all of the statutes examined by the Court in the eight years preceding *Elfbrandt* contained perjury provisions similar to that of the Arizona statute. See also notes 41 and 42 *infra* and accompanying text.

8. Elfbrandt v. Russell, 384 U.S. 11, 16 (1966). (Emphasis added.) The Constitution provides that "Congress shall make no law . . . abridging the freedom of speech, . . . or the right of the people peaceably to assemble. . . ." U.S. CONST. amend. I.

9. 378 U.S. 500 (1964) (construing provision of Subversive Activities Control Act of 1950 making it unlawful for a communist to obtain a passport).

10. 367 U.S. 290 (1961) (construing membership clause of Smith Act making it unlawful to join a subversive organization).

11. 367 U.S. 203 (1961) (construing membership clause of Smith Act making it unlawful to join a subversive organization).

12. Elfbrandt v. Russell, 384 U.S. 11, 22 (1966) (dissenting opinion).

13. *Id.* at 19. To support this tenet the minority cites numerous cases including the following: Adler v. Board of Educ., 342 U.S. 485 (1952); Garner v. Board of Pub. Works, 341 U.S. 716 (1951); Gerende v. Board of Supervisors, 341 U.S. 56 (1951). The minority asserts further that if upon state inquiry into such membership, an employee refuses to affirm or deny his affiliations, he may be discharged. 384 U.S. at 19–20.

14. *Id.* at 20–21 & n.1.

15. *Id.* at 21.

Educ.[16] An examination of pertinent decisions prior and subsequent to *Adler* will be instructive in determining whether the minority's reliance on that case was misplaced.

Adler upheld the constitutionality of a state statute which provided that knowing membership in a subversive organization is prima facie ground for disqualification from employment in the public schools.[17] The decision is grounded upon two propositions: (1) public employment is a privilege, rather than a right;[18] and (2) governmental interest in acquiring fit and loyal employees outweighs any incidental restrictive effect on the employees' rights of free speech and assembly.[19] Regarding the first proposition, it must be noted that the "privilege" concept of public employment is no longer accepted unqualifiedly.[20] Furthermore, the sole decision found by the Court in *Adler* to support its second theory was *Garner v. Board of Pub. Works*[21] which offers little authority since there judgment was expressly reserved as to "whether the [public authority] may determine that an employee's disclosure of [Communist Party] political affiliation justifies his discharge."[22] *Garner* held only that a municipality may inquire of its employees "as to matters that *may prove relevant* to their fitness and suitability for the public service."[23] In addition, no question was there raised as to the effect of such an inquiry on the right of free speech and assembly. Nor have decisions following *Adler* adopted its reasoning. In fact, many of these decisions appear to weaken that case while coincidentally lending support to the holding in the instant case.

In *Wieman v. Updegraff*,[24] the Court held that a state loyalty oath, not requiring proof of scienter, violated due process by excluding persons from public employment "solely on the basis of organizational membership, regardless of their knowledge concerning the organizations to which they had belonged."[25] The importance of this decision to the present discussion is the analysis adopted by the Court. There it was indicated that the Court will review state imposed limitations on public employment to determine their rational relationship to fitness for the employment sought.

16. 342 U.S. 485 (1952). See Elfbrandt v. Russell, 384 U.S. 11, 20 (1966) (dissenting opinion).
17. Adler v. Board of Educ., 342 U.S. 485 (1952).
18. *Id.* at 492. See also United Pub. Workers v. Mitchell, 330 U.S. 75 (1947).
19. 342 U.S. at 493. In that case, the Court reasoned that should a person be disqualified from employment because of membership in a subversive organization, he is not thereby denied his first amendment rights. "His freedom of choice between membership in the organization and employment . . . might be limited, but not his freedom of speech or assembly, except in the remote sense that limitation is inherent in every choice." *Ibid.*
20. We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory.
Wieman v. Updegraff, 344 U.S. 183, 192 (1952); see also Schware v. Board of Examiners, 353 U.S. 232, 238–39 (1957).
21. 341 U.S. 716 (1951).
22. *Id.* at 720.
23. *Id.* at 720. (Emphasis added.)
24. 344 U.S. 183 (1952).
25. *Id.* at 190.

The next case important to the present analysis, and possibly the most significant, is *Speiser v. Randall.*[26] There the Court held it unconstitutional to require an applicant for a tax exemption to maintain the burden of proving that he did not advocate the unlawful overthrow of the government.[27] It has been suggested that the Court in conferring a preferred position upon first amendment rights,[28] has intended *Speiser* to overrule, sub silentio, the holding in *Adler* that mere knowing membership in a subversive organization is prima facie ground for disqualification from public employment.[29] The Court's shift in attitude in *Speiser,* concerning the extent to which a state may proceed when the state's procedures interfere with an individual's first amendment freedoms, is further evidenced by *Shelton v. Tucker.*[30] Although acknowledging a state's unquestioned right to inquire into the competency of its employees, the Court held that when the state's end can be achieved through alternative methods, unoffensive to the first amendment, an employee should not be compelled to disclose every organization to which he has belonged or contributed during the preceding five years.[31]

The two loyalty oath cases which immediately preceded *Elfbrandt* further indicate the Court's intense concern for freedom of speech and association, interests accorded only cursory consideration in *Adler.*[32] In *Cramp v. Board of Pub. Instruction,*[33] a unanimous Court established a new boundary for loyalty oaths by holding a statute unconstitutionally vague on the ground that its terms were not "susceptible of objective

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26. 357 U.S. 513 (1958).

27. *Id.* at 529. Since the entire statutory procedure violated the requirements of due process, applicants were not obliged to subscribe to a loyalty oath which was the first step in the invalid procedure.

28. The vice of the present procedure is that, where particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken fact finding . . . will create the danger that the legitimate utterance will be penalized. The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct must steer far wider of the unlawful zone than if the State must bear these burdens.

Id. at 526. *Cf.,* Winters v. New York, 333 U.S. 507, 509–10 (1948); Cantwell v. Connecticut, 310 U.S. 296, 305 (1940).

29. See A. Morris, *Academic Freedom and Loyalty Oaths,* 28 LAW & CONTEMP. PROB. 487, 505 (1963). Compare the statement in the instant case that disqualification for mere knowing membership constitutes "a conclusive presumption that the member shares the unlawful aims of the organization." Elfbrandt v. Russell, 384 U.S. 11, 17 (1966).

30. 364 U.S. 479 (1960).

31. *Id.* at 488–90.

The objectionable quality of . . . overbreadth . . . [is] the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. . . . The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions.

Elfbrandt v. Russell, 384 U.S. 11, 19 (1966) [quoting from NAACP v. Button, 371 U.S. 415, 432–33 (1963)]. *Cf.,* Cantwell v. Connecticut, 310 U.S. 296, 304 (1940); Schneider v. Town of Irvington, 308 U.S. 147, 161 (1939); Lovell v. Griffin, 303 U.S. 444, 451 (1938).

32. See note 19 *supra.*

33. 368 U.S. 278 (1961).

measurement."[34] The Court, quoting from *Smith v. California*,[35] adhered to the proposition that "stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may be less required to act at his peril here, because the free dissemination of ideas may be the loser."[36] In *Baggett v. Bullitt*,[37] the Court, relying on *Cramp*, struck down an oath as unconstitutionally vague although the statute in *Baggett* required an oath of much narrower scope.[38] In addition, *Baggett* adds to the vagueness doctrine that an oath cannot be cast in such terms so as to create a hazard of subjecting an affiant to a perjury prosecution for "knowing but guiltless behavior."[39]

The foregoing chronicle of cases indicates that the Supreme Court has countenanced the following doctrines: (1) any state imposed limitation on public employment which bears no rational relationship to fitness will be invalidated; (2) first amendment rights stand in a preferred position which prohibits a procedure which conclusively presumes the unlawfulness of an employee's activity involving the exercise of free speech and assembly; (3) the state may not stifle first amendment guarantees when its objective can be more narrowly achieved; (4) the terms of a loyalty oath statute must be susceptible of objective measurement; and, (5) the state may not punish knowing but guiltless behavior.

These doctrines enfeebled the authoritative value of *Adler* and furnished a mandate for the adoption by the majority of the "specific intent" test. They furnished precedent for the Court to declare that it no longer regarded knowing membership in a subversive organization, in itself, as bearing a rational relationship to fitness for public employment,[40] particularly in a situation where an employee's first amendment rights are deemed to outweigh the state's right to condition public employment. Moreover, the "specific intent" test provides an adequate guideline by which to measure the permissible scope of a loyalty oath statute by effectively construing such nebulous criteria as "more narrowly achieved," "susceptible of objective measurement," and "knowing but guiltless behavior."

Whether or not the "specific intent" test will be applied to every loyalty oath statute embodying a membership clause, and whether or not the specter

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34. *Id.* at 286. See generally Note, *The Void-For-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960). The former test for unconstitutional vagueness for loyalty oaths, established in American Communications Ass'n v. Douds, 339 U.S. 382, 413 (1950), was based on mere presence or absence of scienter. See also text accompanying note 25 *supra*.

35. 361 U.S. 147, 151 (1959).

36. Cramp v. Board of Pub. Instruction, 368 U.S. 278, 287 (1961).

37. 377 U.S. 360 (1964).

38. *Id.* at 364–65 nn.3 & 4. Compare Cramp v. Board of Pub. Instruction, 368 U.S. 278, 279 n.1 (1961).

39. *Id.* at 373. Also significant to the present analysis is that the language of the *Baggett* oath focused solely upon subversive *acts*. It is, therefore, reasonable to read *Baggett* to mean that a loyalty oath statute which proscribes less than direct participation in subversive acts would be unconstitutional. Such a reading would render inevitable the ultimate adoption of the "specific intent" test.

40. Compare the language of the Court in the instant case in text accompanying note 48 *infra*.

of *Adler* will reappear to haunt the Court remain unanswered. It is conceivable that *Elfbrandt* will be applied only to those statutes which, like the Arizona statute, provide criminal sanctions for those who swear falsely regarding their loyalty.[41] However, it seems reasonable to conclude that inasmuch as a person obtaining public employment by falsifying his qualifications may subject himself to a perjury prosecution absent such a provision in the oath statute,[42] such absence would not compel an abandonment of the "specific intent" test.

Noting that the instant statute prohibits membership in an organization "having for one of its purposes" the overthrow of the government,[43] it is feasible to interpret *Elfbrandt* to mean that the "specific intent" test will be applied only when the proscribed organizations embrace legal as well as illegal aims; but if the proscribed organizations embrace exclusively illegal aims,[44] the "scienter" test will obtain.[45] Similarly, the statute in question required every public officer and employee within the state to subscribe to the oath.[46] Therefore, it is arguable that the Court may decide, despite earlier indications to the contrary, that mere knowing membership in a subversive organization, in itself, bears a rational relationship to fitness for public employment as to certain officers or employees — for example, those holding positions through which they might be capable of threatening the public interest.[47] If the Court were to adopt such an attitude, a statute requiring an oath taken only by such individuals would not be governed by *Elfbrandt*.

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41. It appears that the dissent would so limit the holding in the instant case. See Elfbrandt v. Russell, 384 U.S. 11, 20–23 (1966) (dissenting opinion). See also note 7 *supra*.

42. See *Id.* at 20–21 & n.1.

43. See note 2 *supra*.

44. Assuming, *arguendo*, that such organizations do exist.

45. Compare Scales v. United States, 367 U.S. 203, 229 (1961); see Elfbrandt v. Russell, 97 Ariz. 140, 146, 397 P.2d 944, 949 (1964) (dissenting opinion).

46. See note 2 *supra*.

47. A case which would appear to support such an argument is American Communications Ass'n v. Douds, 339 U.S. 382 (1950). Section 9(h) of the Taft-Hartley Act [61 Stat. 143 (1947)] required that labor union officers file with the National Labor Relations Board affidavits denying affiliation with or belief in a subversive organization. Non-compliance resulted in their union being placed under a complete disability to assert rights relating to representation, union-shops and unfair labor practices. In holding that the membership provision was not violative of the first amendment the Court stated that:

> Congress could rationally find that the Communist Party is not like other political parties in its utilization of positions of union leadership as means by which to bring about strikes and other obstructions of commerce for purposes of political advantage, and that many people who believe in overthrow of the Government by force and violence are also likely to resort to such tactics when, as officers, they formulate union policy.
>
> The fact that the statute identifies persons by their political affiliations and beliefs, which are circumstances ordinarily irrelevant to permissible subjects of government action, does not lead to the conclusion that such circumstances are never relevant.

Id. at 391.

Interestingly enough, particularly in relation to the text accompanying notes 48–50 *infra*, § 9(h) of the Taft-Hartley Act was repealed in 1959. 73 Stat. 525 (1959), 29 U.S.C. § 159(h) (1965).

It is submitted, however, that *Elfbrandt* will not be construed so narrowly, but that the "specific intent" test will apply to every employee required to subscribe to any loyalty oath containing a membership clause. The primary concern of the Court in the present action was to ensure the preferred position of first amendment freedoms. The Court concluded that these freedoms may not be limited by any loyalty statute which proscribes less than "specific conduct [which constitutes] . . . a clear and present danger to . . . the State."[48] The Court further declared that "those who join an organization but do not share its unlawful purposes and do not participate in its unlawful activities surely pose no threat, either as citizens or as public employees."[49] Such reasoning would seem to govern every oath statute embracing a membership clause and would appear to be as applicable to the chief executive of the state as it is to the state's lowliest employee. Underlying this reasoning, perhaps, is the Court's acknowledgment that a forced loyalty oath fails in its purported purpose of ensuring loyalty among public employees.[50]

Barry Ackerman

CONSTITUTIONAL LAW — SEARCH AND SEIZURE — CLOTHING HELD TO BE IMMUNE FROM SEARCH AND SEIZURE AS MERE EVIDENCE OF CRIMINAL ACTIVITY.

Hayden v. Warden of Maryland Penitentiary
(4th Cir. 1966)

Following his conviction in a Maryland state court for armed robbery, petitioner filed for a writ of habeas corpus in the United States District Court for the District of Maryland. The petitioner alleged that his arrest was illegal, that the search of his home incident thereto was unreasonable,[1] and that the seizure of several articles of clothing discovered by the police in the course of the search was improper since these items constituted

48. Elfbrandt v. Russell, 384 U.S. 11, 18 (1966) [quoting from Cantwell v. Connecticut, 310 U.S. 296, 311 (1940)].

49. *Id.* at 17.

50. See Byse, *A Report on the Pennsylvania Loyalty Act*, 101 U. PA. L. REV. 480, 484 (1953). See text accompanying note 6 *supra*. It should be noted that Solicitor General Thurgood Marshall has decided not to appeal a federal court decision in California that held unconstitutional the non-Communist disclaimer provision in the Medicare Law, stating that *Elfbrandt* "forecloses any argument that the challenged provision is constitutional." N.Y. Times, Jan. 5, 1967, p. 26, col. 6.

1. The procedural issues raised in the petition will not be considered since the scope of this note is limited to a discussion of the "mere evidence" rule.

only mere evidence of criminal activity.[2] In denying the writ, the district court found the arrest to have been legitimate and the search and seizure to have been reasonable.[3] The Fourth Circuit Court of Appeals, although concurring with the district court on the issues of the legality of the arrest and the reasonableness of the search, *held* that the case must be remanded and a federal writ of habeas corpus issued since the seizure of the clothing violated the "mere evidence" rule.[4] *Hayden v. Warden of Maryland Penitentiary,* 363 F.2d 647 (4th Cir.), *cert. granted,* 385 U.S. 926 (1966).

The historical inception of the "mere evidence" rule is found in *Boyd v. United States,*[5] the first case that thoroughly considered unreasonable search and seizure within the context of the fourth amendment.[6] In *Boyd,* the principal issue before the Court was whether or not the compulsory production of a man's private papers was an unreasonable search and seizure within the meaning of the fourth amendment.[7] The

2. A uniform consisting of a pair of trousers and a jacket was seized. Witnesses had observed the felon fleeing from the robbery scene attired in the uniform. The prosecution offered the uniform as evidence at the trial for identification purposes. Hayden v. Warden of Maryland Penitentiary, 363 F.2d 647 (4th Cir. 1966).

3. The court was of the opinion that search of the petitioner's home, during which the uniform was discovered, was narrower in scope than the thorough five hour search which the Supreme Court tolerated in Harris v. United States, 331 U.S. 145 (1947). Hayden v. Warden of Maryland Penitentiary, *supra* note 2, at 651. For the federal standard of reasonableness which must govern a search incident to arrest see United States v. Rabinowitz, 339 U.S. 56 (1950).

4. The "mere evidence" rule is enunciated in a trilogy of Supreme Court cases. Gouled v. United States, 255 U.S. 298, 309 (1921):

> [S]earch warrants . . . may not be used as the means of gaining access to a man's house or office and papers solely for the purpose of making a search to secure evidence to be used against him in a criminal or penal proceeding, but they may be resorted to only when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to possession of it, or when a valid exercise of police power renders possession of the property by the accused unlawful and provides that it may be taken.

United States v. Lefkowitz, 285 U.S. 452, 465–66 (1932):

> The decisions of this court distinguish searches of one's house, office, papers or effects merely to get evidence to convict him of crime from searches such as those made to find stolen goods for return to the owner, to take property that has been forfeited to the government, to discover property concealed to avoid payment of duties for which it is liable, and from searches such as those made for seizure of counterfeit coins, burglar's tools, gambling paraphernalia, and illicit liquor in order to prevent the commission of crime.

Harris v. United States, *supra* note 3, at 154:

> This court has frequently recognized the distinction between merely evidentiary material, on the one hand, which may not be seized either under the authority of a search warrant or during the course of a search incident to an arrest, and on the other hand, those objects which may validly be seized including the instrumentalities and means by which a crime is committed, the fruits of crime, such as stolen property, weapons by which escape of the person arrested might be effected, and property the possession of which is a crime.

5. 116 U.S. 616 (1886).

6. For an historical analysis of the development of the fourth amendment see Reynard, *Freedom From Unreasonable Search And Seizure — A Second Class Constitutional Right?,* 25 IND. L.J. 259, 262–76 (1950).

7. Boyd v. United States, *supra* note 5, at 622.

Court held that it was and, relying upon an interrelation between the fourth and fifth amendments, stated that the involuntary production of private papers, which may be required by a warrant issued in accord with the fourth amendment, violates the self incrimination clause of the fifth amendment.[8] The rule attained maturity in *Gouled v. United States*,[9] where a unanimous Court held that a warrant may not be issued to search for or seize any property of a purely evidentiary nature. This decision rested on the premise advanced in *Boyd* that there is an interrelation between the fourth and fifth amendments; it also extended the *Boyd* prohibition against the seizure of private papers to any property of a purely evidentiary nature. The rule composited from these two cases is that the fifth amendment forbids the use of any form of compulsion to obtain evidence from the accused.[10] A search warrant compelling compliance under pain of law is a form of compulsion,[11] and thus it may not be used solely for the purpose of forcing an accused to turn over evidence in his possession to the prosecution in order that it may be introduced as evidence against him.[12] However, such property is legitimately the subject of a search or seizure if the state can assert some other interest in it,[13] and the subsequent decisions of *United States v. Lefkowitz*[14] and *Harris v. United States*[15] extended the "mere evidence" rule to searches incident to a valid arrest. However, no unanimity of opinion has prevailed among the courts regarding the classification of articles of clothing. They have been held to constitute mere evidence of criminal activity[16] or instru-

8. *Id.* at 633:
We have already noticed the intimate relation between the two amendments. They throw great light on each other. For the "unreasonable searches and seizures" condemned in the fourth amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in a criminal case is condemned in the fifth amendment; and compelling a man "in a criminal case to be a witness against himself," which is condemned in the fifth amendment, throws light on the question as to what is an "unreasonable search and seizure" within the meaning of the fourth amendment.

9. 255 U.S. 298, 309 (1921).

10. Comment, *Evidentiary Searches: The Rule and the Reason,* 54 GEO. L.J. 593, 595–96, 605–06 (1966).

11. Compulsion exists in the search warrant procedure since failure to comply with the warrant is a crime. 18 U.S.C. § 2231(a) (1964). *Cf.* Wood v. United States, 128 F.2d 265 (D.C. Cir. 1942).

12. This concept expressed in *Boyd* and *Gouled* originated in the common law case of Entick v. Carrington, 19 How. St. Tr. 1030, 1074, 95 Eng. Rep. 807 (K.B. 1765), where the court held: "It is very certain that the law obligeth no man to accuse himself, because the necessary means of compelling self accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust: *and it would seem that a search for evidence is disallowed upon the same principle.*" (Emphasis added.) (Quotation found only in official report.)

13. Gouled v. United States, *supra* note 4.

14. 285 U.S. 452, 465–66 (1932).

15. 331 U.S. 145 (1947).

16. In United States v. Richmond, 57 F. Supp. 903 (S.D.W.Va. 1944), the seizure of articles of clothing was held improper because they were innocent in nature and lawfully in defendant's possession. In La Rue v. State, 149 Tex. Crim. 598, 197 S.W.2d 570 (1946), blood spattered clothing was held to be mere evidence of criminal activity, and therefore inadmissible.

mentalities of the crime,[17] and ingenious reasoning often accompanies the particular conclusion.[18]

The Supreme Court decisions in *Mapp v. Ohio*[19] and *Ker v. California*[20] have made critical to the law of search and seizure the distinction between concepts grounded on constitutional provisions and federal procedural rules. The state judiciary must respect rules of the former classification while they may freely disregard the latter. Thus imposition of the federal "mere evidence" rule on a state judicial system[21] can only be justified if it rests on a solid constitutional foundation. In the instant case the court of appeals failed to address itself to this consideration. Because the court neglected to articulate the constitutional foundation of its decision, an extensive examination of the rationales upon which the rule purports to rest and a review of the treatment accorded it by the courts is necessary in order to determine the propriety of imposing the "mere evidence" rule on the state courts as a constitutional requirement.

The "mere evidence" rule is frequently stated in constitutional terms.[22] However, judicial application of the rule to factual situations lacks the consistency one would expect to be accorded a truly constitutional requirement. The discrepancy in the application of the rule is partially the result of a failure to satisfactorily articulate how the fourth and fifth amendments immunize evidential objects from search and seizure.[23]

Basically three explanations are adduced as the constitutional foundations of the "mere evidence" rule.[24] The *Boyd* and *Gouled* decisions are grounded on the principle that only those items in which the state has a direct or derivative possessory interest are subject to search and seizure. The permitted scope of search and seizure is limited to fruits of the

17. In United States v. Guido, 251 F.2d 1 (7th Cir.), *cert. denied,* 356 U.S. 950 (1958), shoes were held to be instrumentalities since they facilitate escape. In Morton v. United States, 147 F.2d 28 (D.C. Cir.), *cert. denied,* 324 U.S. 875 (1945), blood stained clothing was allowed to be taken from accused's closet and introduced in evidence at a murder trial. See State v. Bisaccia, 45 N.J. 505, 213 A.2d 185 (1965), noted in 34 FORDHAM L. REV. 746 (1966); Boles v. Commonwealth, 304 Ky. 216, 200 S.W.2d 467 (1947).

18. Caldwell v. United States, 338 F.2d 385 (8th Cir. 1964).

19. 367 U.S. 643 (1961).

20. 374 U.S. 23 (1963).

21. Maryland has never adhered to such a concept. Matthews v. State, 228 Md. 401, 179 A.2d 892, 893 (1962): "The officers had authority to search the premise and . . . seize tangible evidence of the crime." *Accord,* Davis v. State, 238 Md. 389, 204 A.2d 76 (1964); Shorey v. State, 227 Md. 385, 177 A.2d 245 (1962).

22. *E.g.,* Davis v. United States, 328 U.S. 582 (1946); Harris v. United States, *supra* note 3; United States v. Lefkowitz, *supra* note 4; Takahashi v. United States, 143 F.2d 118 (9th Cir. 1944); United States v. Lerner, 100 F. Supp. 765 (N.D. Cal. 1951).

23. People v. Thayer, 47 Cal. Rptr. 780, 408 P.2d 108 (1965), (dictum), noted in 32 BROOKLYN L. REV. 400 (1966). See Comment, *Evidentiary Searches: The Rule and the Reason, supra* note 10, at 607–21. See generally Shellow, *The Continuing Vitality of the Gouled Rule: The Search For and Seizure of Evidence,* 48 MARQ. L. REV. 172 (1964).

24. See Comment, *Limitations On Seizure of Evidentiary Objects: A Rule In Search Of A Reason,* 20 U. CHI. L. REV. 319 (1953).

crime, its instrumentalities and contraband.[25] The fruits of the crime belong to the victim, and are therefore seizable as a vindication of his title. Instrumentalities of a crime are said to be forfeited to the state under an expansion of the ancient concept of deodand,[26] and no one has a private possessory right in that which the law determines to be contraband.[27] Thus there can be no search for or seizure of merely evidential objects since they do not fall within the permitted categories. Such an explanation, however, misconstrues the primary purpose of search and seizure. Objects are not searched for or seized to vindicate a proprietary right, but rather to aid in proving the guilt of the accused.[28] Search and seizure springs not from a desire to take from the accused that in which he has no possessory right, but from a longing to protect the personal rights of others by placing the accused in a position in which crime is impossible.[29]

Judicial construction has further lessened the value of this right-to-possession rationale as an explanation of the constitutional foundation of the "mere evidence" rule. Under *Gouled* the legitimacy of search or seizure is dependent upon the "primary interest" which the state has in the particular evidence. This concept of "primary interest" has been extended, at least in one area, to property technically owned by the individual. Records which are required by law to be kept are seizable as evidence of crime, even though legal title may remain in the individual.[30] They are quasi public in nature, the state being said to have a "primary interest" in them.[31] It has never been determined why the state does not have such a "primary interest" in everything tending to prove guilt.[32] It is difficult to discern a trace of the right-to-possession concept in the

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25. The historical foundation of this concept is the sovereign's right to seize those objects that it is illegal to possess or to which he may assert a claim because they have been wrongfully obtained or used. Boyd v. United States, 116 U.S. at 623:

> The search for and seizure of stolen or forfeited goods . . . are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ *toto coelo*. In the one case, the government is entitled to the possession of the property; in the other it is not.

"So, also, the laws . . . provide for the searches and seizures of articles and things which it is unlawful for a person to have in his possession for the purpose of its use or disposition. . . ." *Id.* at 624. For numerous cases upholding the government's right to seize fruits of the crime, instrumentalities and contraband see cases cited in Comment, *Evidentiary Searches: The Rule and the Reason, supra* note 10.

26. State v. Chinn, 231 Ore. 259, 373 P.2d 392 (1962); see 2 POLLOCK & MAITLAND, THE HISTORY OF ENGLISH LAW 473 (2d ed. 1898); see generally Kaplan, *Searches and Seizures: A No-Man's Land In The Criminal Law,* 49 CALIF. L. REV. 474, 477–79 (1961).

27. Marderosian v. United States, 337 F.2d 759 (1st Cir. 1964).

28. Jones v. United States, 362 U.S. 257, 266 (1960); State v. Bisaccia, *supra* note 17, at 187; see Comment, *Search And Seizure In The Supreme Court,* 28 U. CHI. L. REV. 664, 674–78 (1961).

29. People v. Thayer, *supra* note 23, at 109.

30. United States v. Kempe, 59 F. Supp. 905 (N.D. Iowa 1945). *But see* Freeman v. United States, 160 F.2d 72 (9th Cir. 1947), in which stock record books were held to be immune from seizure since they did not constitute an instrumentality.

31. Rodgers v. United States, 138 F.2d 992 (6th Cir. 1943).

32. See 20 MICH. L. REV. 93 (1921).

fourth amendment.[33] However, it is maintained that the fifth amendment requires an interpretation of the fourth which would exclude search and seizure of mere evidence.[34] It is also held that the "mere evidence" rule rests squarely on the fifth amendment.[35] This latter proposition is not logically conclusive. If it is violative of the privilege against self-incrimination to search for or seize merely evidential items, then there is compelling reason to immunize also the instrumentalities of the crime. Their capacity to incriminate may be far more real than that of merely evidential objects. Yet instrumentalities are held to be properly the subject of search and seizure.[36]

The notion that the fifth amendment demands an interpretation of the fourth which would prohibit search and seizure of mere evidence may have recently been restricted by the Supreme Court in *Schmerber v. California*.[37] There the Court held that the scope of the privilege against self-incrimination was confined to compelled "communication or testimony" and that compulsion inducing an accused to produce real or physical evidence is without the pale of that privilege.[38] This may have restricted the rule expressed in *Boyd*[39] and *Gouled*, that the fifth amendment prohibits the issuance of a search warrant for mere evidence, to those cases which involve the production of private papers. Such documents may still be considered as communications and thus protected. However, application of the "mere evidence" rule to cases which involve tangibles other than private papers is now more difficult to justify on fifth amendment grounds.

The comprehensive right of privacy secured by the fourth and fifth amendments forms the final, commonly offered explanation of the constitutional basis of the "mere evidence" rule.[40] *Boyd* states that the fundamental right of privacy preserved by these two amendments is of "the very essence of constitutional liberty."[41] The "mere evidence" rule may provide additional protection of this right by confining the permitted range of search. "[L]imitations upon the fruit to be gathered tend to limit the quest

33. State v. Bisaccia, *supra* note 17, at 187.

34. Boyd v. United States, *supra* note 8.

35. Davis v. United States, *supra* note 22, at 505 (dissenting opinion of Mr. Justice Frankfurter); Richmond v. United States, *supra* note 16; Davis, FEDERAL SEARCHES AND SEIZURES § 1.71 (1964).

36. See notes 4 & 25 *supra*.

37. 384 U.S. 757 (1966).

38. *Id.* at 764. This is not a novel interpretation of the fifth amendment. Mr. Justice Holmes stated in Holt v. United States, 218 U.S. 245 (1910): "[T]he prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communication from him, not an exclusion of his body as evidence when it may be material." See also Schenck v. United States, 249 U.S. 47, 50 (1919). See generally Corwin, *The Supreme Court's Construction Of the Self-Incrimination Clause*, 29 MICH. L. REV. 1 (1930).

39. 116 U.S. at 633: "And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is substantially different from compelling him to be a witness against himself."

40. See Lopez v. United States, 373 U.S. 427, 454–57 (1963) (concurring opinion of Mr. Chief Justice Warren); *Cf.*, Frank v. Maryland, 359 U.S. 360 (1959).

41. *Supra* note 5, at 630.

itself. . . ."[42] The pervasiveness of this rationale as an explanation of the "mere evidence" rule has been limited by the Supreme Court itself. The Court has refused to apply the rule to an area of the law in which privacy is severely invaded — wiretap cases. In *On Lee v. United States*[43] the *Gouled* rule was held to apply only to tangible objects. If it is the function of this rule to secure personal privacy, the rationality of this limitation on its potential effectiveness can be questioned.[44]

The foregoing indicates that the rationales offered as explanations for the constitutional foundations of the "mere evidence" rule belie its constitutional underpinnings. Nor has judicial interpretation reinforced or given vitality to the rule. The Supreme Court, after unequivocally enunciating the rule, has allowed its debilitation by qualification and exception, and in *Zap v. United States,*[45] may have reduced it to a virtual nullity. In *Gouled* it was stated that only fruits of the crime, its instrumentalities, and contraband may be searched for and seized. The Court's own confusion and indecision as to what constitutes an instrumentality has severely emasculated the rule.[46] In *Marron v. United States*[47] certain utility bills were held to be properly the subject of seizure on the ground that they were so "closely related to the business [that] it [was] not unreasonable to consider them as used to carry it on."[48] If that statement is accepted as the criterion of instrumentality very little could fail to qualify. In *United States v. Lefkowitz*[49] ledgers and bills were seized during a search incident to an arrest. The search was held to be exploratory. However, the Court stated that the bills were unoffending in themselves, although they were perhaps intended to be used in a criminal conspiracy.[50] In *Abel v. United States*[51] the Court conceded that the two decisions were irreconcilable and stated that each must be decided on its own facts.[52] Such an acknowledgement may intimate that there is no overriding consideration dispositive of the issue.[53]

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42. United States v. Poller, 43 F.2d 911, 914 (2d Cir. 1930). For arguments that limitations on the permitted scope of search do not limit the quest, see Kaplan, *Search And Seizure: A No-Man's Land In The Criminal Law,* 49 CALIF. L. REV. 474, 478 (1961).

43. 343 U.S. 747, 753 (1952); see Olmstead v. United States, 277 U.S. 438, 461–63 (1928).

44. People v. Thayer, *supra* note 23. Regarding the application of the "mere evidence" rule to wire tap cases see Kamisar, *The Wiretapping Eavesdropping Problem: A Professor's View,* 44 MINN. L. REV. 891, 914–18 (1960); Comment, *Eavesdropping Orders and the Fourth Amendment,* 66 COLUM. L. REV. 355 (1966).

45. 328 U.S. 624 (1945).

46. See Comment, *Evidentiary Searches: The Rule And The Reason, supra* note 10, at 605–16.

47. 275 U.S. 192 (1927).

48. *Id.* at 199.

49. 285 U.S. 452 (1932).

50. *Id.* at 465.

51. 362 U.S. 217 (1960).

52. *Id.* at 235.

53. In Foley v. United States, 64 F.2d 1 (5th Cir. 1933), the court followed the reasoning of *Marron* and admitted into evidence certain ledgers. However, in United

Unguided by any clear method of distinguishing instrumentalities from merely evidential matter, the lower courts have reached conflicting results. Not only is there an inconsistency in the decisions among the districts,[54] but conflicting views have even been adopted within the same district. In *United States v. Loft on 6th Floor of Bldg.*[55] the district court granted a motion to suppress letters offering obscene material for sale; they were held to be mere evidence of the crime. In *United States v. Klaw*[56] the same court held that circulars offering pornography for sale were instrumentalities of the crime. Further, the instrumentalities qualification has been distended to the point that it is no longer necessary to prove that the objects were actually used in the commission of the crime. It was stated by the court in *United States v. Pardo Bolland*[57] that in the interest of justice the line between instrumentality and mere evidence should not be drawn too finely. Thus it is necessary only to show that the object seized is reasonably capable of criminal use.[58]

Weeks v. United States[59] and *United States v. Kirschenblatt*[60] contain an exception to the "mere evidence" rule which has greatly qualified it. Those two cases hold that evidentiary material found on the person of the accused incident to his arrest is not immune from seizure. This exception makes the issue of seizability of material depend not on its characterization as mere evidence, but rather on something extraneous to that issue — its presence on the person of the accused.[61] In *Zap v. United States*[62] the emasculation of the "mere evidence" rule may have been completed. Mr. Justice Douglas, speaking for the majority, stated that testimentary or even photographic evidence may be introduced at the trial concerning objects not subject to seizure.[63] If this statement be

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States v. Poller, *supra* note 42, the court held ledgers to be evidentiary and therefore inadmissible. The same conclusion was reached in Bushouse v. United States, 67 F.2d 843 (6th Cir. 1933).

54. *Compare* United States v. Lerner, 100 F. Supp. 765 (N.D. Cal. 1951) (an address book held not to be an instrumentality), *with* Matthew v. Correa, 135 F.2d 534 (2d Cir. 1943) (an address book held to be an instrumentality).

55. 182 F. Supp. 322 (S.D.N.Y. 1960).

56. 227 F. Supp. 12 (S.D.N.Y. 1964), *rev'd on other grounds,* 350 F.2d 155 (2d Cir. 1965).

57. 229 F. Supp. 473 (S.D.N.Y. 1964), *aff'd,* 348 F.2d 316 (2d Cir. 1965), *cert. denied,* 382 U.S. 407 (1965).

58. *Id.* at 476.

59. 232 U.S. 383, 392 (1914). The government has the right "to search the person of the accused when legally arrested to discover and seize the fruits or *evidences* of crime." (Emphasis added.)

60. 16 F.2d 202, 203 (2d Cir. 1926): "Whatever the casuistry of border cases, it is broadly a totally different thing to search a man's pockets and use against him what they contain, from ransacking his house for everything which may incriminate him, once you have gained lawful entry, either by means of a search warrant or by his consent."

61. For criticism of this exception see Comment, *Search And Seizure of "Mere Evidence" — Amendment To Or. Rev. Stat. Sec. 141.010 — Effect On Prior Law and Constitutionality,* 43 ORE. L. REV. 333, 342-46 (1964).

62. See *supra* note 45.

63. Zap v. United States, 328 U.S. 624, 629 (1945). In Williams v. United States, 263 F.2d 487 (D.C. Cir. 1959), the court held, in contradiction to *Zap,* that the testi-

accepted, application of the "mere evidence" rule to a factual situation in which the items are discovered in the course of a valid search would be of little consequence.

The foregoing discussion bespeaks a certain uneasiness which many courts feel toward the "mere evidence" rule, and describes the various rationales they have employed to restrain its effect. The majority opinion in *Hayden,* on the other hand, represents a decided expansion of the rule's potential scope of application. This decision is an attempt by the federal judiciary to impose upon the state courts as a constitutional mandate the concept that mere evidence of criminal activity is immune from search and seizure. When the impulse of other courts to constrain the applicability of the "mere evidence" rule and the broadening effect which this decision may have on its sphere of operation are considered, the failure of the *Hayden* majority to provide an articulate, reasoned justification for the use and extension of the rule is surprising. The majority opinion simply asserts that the clothing was not an instrumentality and was therefore not subject to search and seizure. An examination of the rule and a critical analysis of the reasoning which would tend to support a conclusion that the clothing was properly seizable would have better served the court's position. Three factors lend themselves to further consideration — the instrumentality qualification, the underlying rationale of the rule itself as applied to clothing, and the current philosophy of the Supreme Court.

It was held in *United States v. Guido*[64] that because shoes could facilitate escape they might be found to be instrumentalities of criminal activity and therefore subject to seizure. The argument advanced by the dissent in *Hayden* resembles that offered in *Guido.* The petitioner by his removel and concealment of the items of clothing has himself put them at issue and demonstrated their essential link to the crime. But the majority refused to consider such a rationale as a possible alternative to its holding the clothing to be mere evidence. Instead it stated that *Guido* could not be reconciled with the pronouncements of the Supreme Court. When the position of the Court concerning the essential character of an instrumentality — that there is no absolute determinant[65] — is recalled, this unexplained disqualification of the clothing is curious. The majority also failed to consider and distinguish the growing body of case law which asserts that actual use, or even actual intention to use, is not essential to the classification of an item as an instrumentality.[66]

In its limited consideration of the constitutional basis of the "mere evidence" rule the majority stated that on the basis of the fourth amend-

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mentary evidence of an officer concerning objects seen in the course of a search was inadmissible. This evidence was excluded, however, primarily because the search itself was unreasonable, there having been no warrant or consent.

64. See *supra* note 17.

65. See *supra* notes 47–52 and accompanying text.

66. United States v. Pardo Bolland, *supra* note 57; United States v. Lord, 184 F. Supp. 923 (S.D.N.Y. 1960).

ment no distinction can be drawn between papers and articles of clothing.[67] Indeed, the court intimated that a search for mere evidence is per se unreasonable. However, the court had found the search in the instant case to have been reasonable. It has thus placed itself in the difficult position of holding that a search previously found to be reasonable may at the same time be unreasonable if merely evidential objects are seized. In order to obviate such an inconsistency Chief Justice Weintraub of New Jersey has argued in *State v. Bisaccia,*[68] another case involving the seizure of shoes, that for purposes of application of the "mere evidence" rule papers should be distinguished from other tangibles. The fourth amendment was adopted primarily as a safeguard against the noxious writs of assistance which authorized general and exploratory searches.[69] It is Judge Weintraub's thesis that the "mere evidence" rule may be invoked as an additional protection of privacy in searches of private papers. Such searches entail the rummaging through books and files, the exposing of confidences, thus becoming, in effect, an exploratory search.[70] However, in searches for other tangibles when specificity is possible the rule protects no vital interest.[71] The *Weeks* and *Kirschenblatt* exception,[72] that mere evidence found on the person of the defendant is subject to seizure, supports Justice Weintraub's conclusion. This is, of course, premised on the notion that there will be no general search of the person.[73] Thus if articles of clothing in which a defendant is attired at the time of his arrest are seizable[74] for purposes of identification[75] and scientific examination,[76] it is difficult to determine how the clothing becomes immunized by the simple act of disrobement when the search is otherwise reasonable. As Mr. Justice Cardozo stated: "The line between fruit of the crime itself and mere evidence thereof may be narrow; perhaps this turns more on the good faith of the search than the actual distinction between the matters turned up."[77]

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67. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S. CONST. amend. IV.

68. *Supra* note 17, at 192.

69. Sanford v. Texas, 379 U.S. 476, 481, 485 (1965); Reynard, *Freedom From Unreasonable Search and Seizure — A Second Class Constitutional Right?, supra* note 6, at 275.

70. United States v. Kirschenblatt, *supra* note 60, at 204.

71. State v. Bisaccia, *supra* note 17, at 192.

72. See *supra* notes 59–61 and accompanying text.

73. United States v. Kirschenblatt, *supra* note 60, at 203.

74. Robinson v. United States, 283 F.2d 508 (D.C. Cir.), *cert. denied,* 364 U.S. 919 (1960).

75. King v. Pinto, 256 F. Supp. 522 (D.N.J. 1966).

76. United States v. Margeson, 246 F. Supp. 219 (S.D. Me. 1966); *accord,* State v. Wragg, 395 S.W.2d 196 (Mo. 1965); People v. Shaw, 237 Cal. App. 2d 606, 47 Cal. Rptr. 96, *cert. denied,* 384 U.S. 964 (Dist. Ct. App. 1965).

77. Matthews v. Correa, *supra* note 54, at 537.

It is to the rationale[78] of *Boyd* and *Gouled* that the *Hayden* majority must ultimately look for the justification of its failure to distinguish papers and other tangibles. However the *Boyd-Gouled* rationale may have been limited by *Schmerber* to cases involving the production of personal papers. Therefore, it may be undesirable to permit unrestrained application of the "mere evidence" rule when the theory upon which it is premised has been circumscribed. Finally, the recent Supreme Court decisions, *Escobedo v. Illinois*[79] and *Miranda v. Arizona*,[80] have put forth stringent requirements for the admission of confessions. As a result a premium is placed upon evidence based on scientific investigation. Thus law enforcement authorities are urged to make impressions of footprints discovered at the scene of the crime or to analyze the dried blood found on the accused's clothing.[81] Such exhortations may be of little avail unless an adequate opportunity is afforded the police to obtain such items.

It is urged that a decisive reevaluation of the "mere evidence" rule be undertaken by the Court before other states'[82] individual rules regarding the admissability of evidence of criminal guilt are tailored to fit the federal standard.[83] Just as it was recognized in *Kerr,* some concepts, heretofore stated in constitutional terms, must be reinterpreted in light of the "demands of our federal system."[84] It is submitted that the "mere evidence rule is an apt candidate for such review. If it is determined that the rule is in fact grounded in the constitution, further definition of its scope and delineation of the line separating mere evidence from instrumentality will be necessary.

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78. See *supra* notes 5–13 and accompanying text.

79. 378 U.S. 478 (1964).

80. 384 U.S. 436 (1966).

81. Schmerber v. California, *supra* note 37, by holding that the extraction of a blood sample from the accused is not violative of the privilege against self-incrimination, serves to illustrate this point.

82. California, in People v. Thayer, *supra* note 23, and New Jersey, in State v. Bisaccia, *supra* note 17, have rejected the notion that the "mere evidence" rule is a constitutional mandate. *Contra,* State v. Naturile, 83 N.J. Super. 563, 200 A.2d 617 (1964). Other state courts have also refused to apply the "mere evidence" rule in state proceedings: State v. Raymond, 142 N.W.2d 444 (Iowa 1966); State v. Coolidge, 208 A.2d 322 (N.H. 1965); People v. Carroll, 38 Misc. 2d 630, 238 N.Y.S.2d 640 (Sup. Ct. 1963); People v. Martin, 49 Misc. 2d 268, 267 N.Y.S.2d 404 (Sup. Ct. 1966); Eisentrager v. State, 79 Nev. 38, 378 P.2d 526 (1963). Other jurisdictions have ignored the issue and have admitted mere evidence of criminal activity: Bryant v. State, 106 Ga. 642, 127 S.E.2d 826 (1962); State v. Wade, 190 Kan. 624, 376 P.2d 915 (1962); People v. Kaigler, 368 Mich. 281, 118 N.W.2d 406 (1962); State v. Goff, 174 Neb. 548, 118 N.W.2d 625 (1962); State v. Ball, 123 Vt. 26, 179 A.2d 466 (1962).

83. FED. R. CRIM. P. 41(b) provides that warrants may be issued to search for and seize only such property as is:

1) Stolen or embezzled in violation of the Laws of the United States; or
2) Designed or intended for use or which is or has been used as the means of committing a criminal offense; or
3) Possessed, controlled or designed or intended for use or which is or has been used in violation of Section 957 of revised Title 18 U.S.C. § 957.

84. Ker v. California, *supra* note 20, at 33.

CRIMINAL LAW — SENTENCING — PROSECUTION HAS THE BURDEN OF JUSTIFYING IMPOSITION OF A LONGER SENTENCE THAN THAT GIVEN AT PRIOR TRIAL FOR SAME OFFENSE.

Patton v. North Carolina (W.D.N.C. 1966)

In 1960 petitioner, without the assistance of counsel, was tried and convicted for armed robbery and sentenced to twenty years imprisonment. After serving five years, he sought and was granted a new trial pursuant to the Supreme Court ruling in *Gideon v. Wainwright*,[1] but was again convicted. Upon his second conviction petitioner received a twenty-five year sentence which the trial court reduced to twenty years by crediting petitioner with the time he had served under the original sentence. Because the longer sentence also extended the time before he would be eligible for parole, petitioner sought a writ of habeas corpus[2] in the United States District Court for the Western District of North Carolina, contending that he had been unconstitutionally penalized for securing a new trial. The court *held* that a defendant's constitutional right to credit for time served under a previous sentence may be effectively avoided by the imposition of an increased sentence at a second trial only when a discernable reason exists for the harsher punishment. In the absence of such a reason, the imposition of harsher punishment at a second trial is so fundamentally unfair as to violate the due process and equal protection clauses of the fourteenth amendment.[3] *Patton v. North Carolina,* 256 F. Supp. 225 (W.D.N.C. 1966).

The practice of denying a defendant credit for time served under a prior conviction has been justified by the use of two theories customarily referred to as the "void" and "waiver" doctrines.[4] Both of these doctrines were originally employed to prevent a defendant, who had been erroneously convicted, from asserting the defense of double jeopardy as a bar to reprosecution after he had secured a reversal of his original conviction.[5]

1. 372 U.S. 335 (1963).

2. The habeas corpus review sought by petitioner in the instant case must be distinguished from cases which arise on appeal in those jurisdictions which provide appellate courts with the power to review and modify legal but excessive sentences. See generally Mueller, *Penology on Appeal: Appellate Review of Legal but Excessive Sentences,* 15 VAND. L. REV. 671 (1962).

3. The *Patton* court took jurisdiction in this case despite the fact that North Carolina provided a post-conviction procedure to review punishments. North Carolina case law, however, rendered recourse to its court useless. Hence, jurisdiction could be maintained under the exception that the available state process was ineffective to protect the petitioner's rights. 28 U.S.C. § 2254 (1964). As to Patton, the court found no evidence which rationally tended to support the imposition of an increased sentence and ordered that he be constitutionally resentenced within ninety days. Patton v. North Carolina, 256 F. Supp. 225, 236 (W.D.N.C. 1966).

4. There are jurisdictions which have maintained that sentence procedures are an exclusive legislative concern and thus dispose of claims for credit time on that basis. See People v. Judd, 396 Ill. 211, 71 N.E.2d 29 (1947); *In re* Doelle, 323 Mich. 241, 35 N.W.2d 251 (1948). For a list of statutes which provide for the right to credit, see Whalen, *Resentence Without Credit For Time Served: Unequal Protection Of The Laws,* 35 MINN. L. REV. 239 (1951).

5. At common law in England, once an error had been discovered in the criminal proceeding under which an individual had been convicted, the government was pre-

Courts utilizing the "waiver" doctrine held that the defense of double jeopardy would not be sustained in such cases since the defendant waived that guarantee when he appealed his conviction and secured a reversal.[6] Under the "void" doctrine it was held that a reversal of the original conviction operated as a nullification of that conviction and thereby eliminated it as the basis for a double jeopardy plea by the defendant in the subsequent prosecution.[7]

While the use of these doctrines provided a rationale for the reprosecution of a defendant whose conviction had been reversed, the scope of their application was not so limited. In *Ogle v. State*,[8] decided by the Texas Court of Criminal Appeals, the defendant argued that a denial of credit for time served under an original conviction would amount to a violation of his constitutional guarantee against double jeopardy.[9] The court in *Ogle* answered defendant's argument by reasoning that since the prior conviction of defendant was void the sentence resulting therefrom was void as well. Thus any time served under that sentence was also void and could not be credited against a subsequent sentence. This analysis was adopted by numerous courts and persists today in a majority of jurisdictions.[10]

The "waiver" doctrine was similarly applied by the Indiana Supreme Court in *McDowell v. State*[11] where defendant, whose conviction had been reversed, asserted that he should not have been prosecuted a second time, or in the alternative, that he should not have been denied three years credit for the time served under the original conviction. The defendant claimed that either of these actions placed him in jeopardy a second time thus violating his constitutional right against double jeopardy. The court in *McDowell* answered both these contentions by reasoning that defendant waived his double jeopardy guarantee, when at his instance, the original conviction was reversed. As a result, defendant could not utilize the double jeopardy guarantee to avoid serving the three years a second time.[12]

In addition to the potential loss of credit for time already served, an erroneously convicted defendant is forced to consider the risk that a second conviction would expose him to the possibility of receiving a harsher sen-

cluded from reprosecuting. This situation influenced American courts into nullifying the entire proceeding for fear that a criminal would ultimately escape punishment by securing a reversal of his original conviction. Thus the courts failed to realize that the criminal proceeding could have been, and in fact was, split up for given purposes. See Whalen, *supra* note 4, at 243. See generally Comley, *Former Jeopardy*, 35 YALE L.J. 674 (1926).

6. See Trono v. United States, 199 U.S. 521 (1905). *But see* Green v. United States, 355 U.S. 184 (1957) (Frankfurter, J., dissenting).

7. See Ball v. United States, 163 U.S. 662 (1896); United States v. Harman, 68 Fed. 472 (D. Kan. 1895).

8. 43 Tex. Crim. 219, 63 S.W. 219 (1901).

9. *Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1873), stated expressly that double jeopardy applied to punishment as well as to prosecution.

10. See, *e.g.*, Minto v. State, 9 Ala. App. 95, 64 So. 369 (1913); Commonwealth v. Murphy, 174 Mass. 369, 54 N.E. 860 (1899), *aff'd*, 177 U.S. 155 (1901); Morgan v. Cox, 75 N.M. 472, 406 P.2d 347 (1965).

11. 225 Ind. 495, 76 N.E.2d 249 (1947).

12. *Accord*, State v. Terreso, 56 Kan. 126, 42 Pac. 354 (1895); Hobbs v. State, 231 Md. 533, 191 A.2d 238, *cert. denied*, 375 U.S. 914 (1963); *Ex parte* Wilkerson, 76 Okla. Crim. 204, 135 P.2d 507 (1943).

tence than he had received at the original trial. The United States Supreme Court encouraged the practice of imposing harsher sentences at a second trial when it applied the "waiver" doctrine in *Stroud v. United States.*[13] There the defendant, convicted of a murder for the second time, received the death penalty at his second trial, after he had obtained a reversal of his original conviction and sentence of life imprisonment. The Supreme Court rejected the defendant's double jeopardy argument by reasoning that in securing a reversal of the first conviction he had waived it as the basis for a double jeopardy objection.[14] Presently, the imposition of harsher sentences upon successful criminal appellants is permitted throughout the federal courts and also in a substantial majority of the state courts.[15]

For forty years after the Court laid to rest these double jeopardy objections, neither the practice of denying credit for time served nor that of increasing sentences of a second trial was seriously threatened. The present challenge to the constitutionality of both practices was foreshadowed by the case of *Green v. United States.*[16] There the Supreme Court struck down a first degree murder conviction after the reversal of a conviction of second degree murder. The Court reasoned that the conviction for second degree murder impliedly acquitted the defendant of first degree murder, and therefore a second prosecution for first degree murder constituted double jeopardy.[17] However, *Green's* relevance to the issue in the instant case centers around the Court's statement that the risk of a second prosecution for first degree murder, including a death sentence, unreasonably conditions a prisoner's right to appeal for the correction of errors in his conviction.[18]

In *People v. Henderson*[19] the California Supreme Court focused on the concern for the defendant's right to appeal as evidenced in the *Green* case and applied similar reasoning to the issue of harsher sentencing at a second trial. The court struck down a death penalty imposed on the petitioner after he had obtained a reversal of his original conviction and life sentence for murder. Overruling its own cases which had reviewed harsher sentencing at retrial the court said:

> [D]efendant's *right to appeal* from an erroneous judgment is unreasonably impaired when he is required to risk his life to invoke that right. Since the state has no interest in preserving erroneous judgments, it has no interest in foreclosing appeals therefrom by . . . imposing unreasonable conditions on the *right to appeal.*[20]

13. 251 U.S. 15 (1919), *rehearing denied,* 251 U.S. 380 (1920). *But see* People v. Henderson, 60 Cal.2d 482, 386 P.2d 677, 35 Cal. Rptr. 77 (1963), where the California Supreme Court read Green v. United States, 355 U.S. 184 (1957), as vitiating the ruling in the *Stroud* case.

14. Stroud v. United States, *supra* note 13, at 18; People v. Henderson, 60 Cal. 2d 482, 386 P.2d 677, 35 Cal. Rptr. 77 (1963).

15. Van Alstyne, *In Gideon's Wake: Harsher Penalties And The "Successful" Criminal Appellant,* 74 YALE L.J. 607, 610 (1965).

16. 355 U.S. 184 (1957).

17. *Id.* at 193.

18. *Id.* at 194.

19. 60 Cal. 2d 482, 386 P.2d 677, 35 Cal. Rptr. 77 (1963).

20. *Id.* at 497, 386 P.2d at 686, 35 Cal. Rptr. at 92. (Emphasis added.)

In *United States v. Boyce*,[21] the Court of Appeals for the Fourth Circuit, also facing the issue of harsher sentences in relation to the protection of a prisoner's right to appeal, stated in unequivocal terms that the use of increased sentences to inhibit the right to appeal could not be sustained. However, the Court found no facts to support the petitioner's contention that he had received an increase for that reason.[22] The *Boyce* case may be viewed as indicative of the traditional position taken by the courts toward the interplay of harsher sentencing at a second trial and the protection of a petitioner's right to correct errors in his conviction.[23] It is therefore more expansive than *Henderson,* at least in the sense that any increased sentence at a second trial may be considered as an attempt by the trial court to frustrate prisoners in their efforts to appeal erroneous convictions. However, application of the *Boyce* decision is limited by the fact that in an individual case the petitioner is presented with an almost insurmountable burden of proving that the trial judge's motive in giving an increased sentence was the desire to discourage appeals.[24]

In the instant case Judge Craven rejected the "void" and "waiver" doctrines in favor of a more realistic approach to the credit and harsher sentence issues.[25] Agreeing with Mr. Justice Bobbit who stated in *State v. Weaver*[26] that "the hard fact of his actual service of sentence . . . cannot be ignored," Judge Craven disputed the notion that the application of these doctrines could justify erasing the years a man had served in prison.[27] A denial of credit for that time against the sentence imposed at a second trial was "so fundamentally unfair as to constitute a violation of the Due Process and Equal Protection clauses of the Fourteenth Amendment. . . ."[28] His rejection of the "void" and "waiver" doctrines is supported by a number of cases and commentators who have maligned[29] and ridiculed[30]

21. 352 F.2d 786 (4th Cir. 1965).

22. *Id.* at 788.

23. Actually the case seems to reiterate the presumption that the trial judge was properly motivated in increasing the length of the original sentence, even when the increase immediately followed the defendant's declaration of his intent to appeal. See Nichols v. United States, 106 F. 672 (8th Cir. 1901).

24. In relation to the difficulty, Judge Craven stated:

> To put upon the prisoner the burden of proving improper trial judge motivation is like granting him the opportunity to move Parnassus with a spoon. Not even another trial judge has the omniscience to divine his brother's motivation.

Patton v. North Carolina, 256 F. Supp. 225, 235 (W.D.N.C. 1966). It is interesting to note that the defendant in the *Boyce* case accused Judge Craven of imposing harsher sentences for the purpose of frustrating the right to appeal. Patton v. North Carolina, *supra* at 236 n.14.

25. After discussing the doctrines as they were applied in North Carolina, Judge Craven said: "Four years and four months of a man's liberty ought not to be wiped out by legal fiction." *Id.* at 233.

26. 264 N.C. 681, 142 S.E.2d 633 (1965).

27. Patton v. North Carolina, *supra* note 24, at 233.

28. *Id.* at 236.

29. See King v. United States, 98 F.2d 291 (D.C. Cir. 1938), where it is suggested ad absurdum that under the void sentence theory when a prisoner obtains a reversal he should be held in quasi contract for the services he received in prison.

30. See Agata, *Time Served Under a Reversed Sentence or Conviction — A Proposal and a Basis for Decision,* 25 MONT. L. REV. 3 (1963).

the unwarranted application of those doctrines to the credit and harsher sentence issues.

If *Patton* did no more than place the question of credit for time served within the purview of the fourteenth amendment it would be highly significant. However, a technicality of North Carolina case law[31] revealed that the fourteenth amendment could not provide sufficient protection of the defendant's right to credit for time served. Since, historically, courts in all jurisdictions had treated the issues of credit for time served and harsher sentencing at a second trial as separate issues,[32] it had been possible to pay lip service to the injustice of denying the defendant credit and yet avoid the effect of crediting that time by imposing a longer sentence at the second trial. This is precisely what occurred at Patton's second trial, where the trial judge, following *State v. Weaver*,[33] did allow credit for the five years Patton had already served but only against the *maximum* sentence which could have been imposed for Patton's offense (twenty-five years). In effect, Patton, through the imposition of a longer sentence, had been first granted and then denied credit for the time he had served.

Since this practice of increasing sentences at a second trial was so widely accepted, a limitation on that practice was necessary in order to avoid an easy circumvention of the right to credit for time served. In the instant case the limitation provided by the court was a *rebuttable presumption* that the proper punishment had been imposed at the original trial.[34] Judge Craven reasoned that if a harsher sentence was to be imposed at defendant's second trial the record must show facts which tend to rationally support the imposition of such a penalty, or the second sentence will fall.[35] The position taken by the court in *Patton* is clearly a solution to the difficulty of proof which the *Boyce* case left unanswered.[36] Henceforth, the state will carry the burden of justifying the increased sentence and the

31. In State v. Williams, 261 N.C. 172, 134 S.E.2d 163 (1964), the North Carolina Supreme Court had expressly rejected the notion that credit for time served was compelled. State v. Weaver, 264 N.C. 681, 142 S.E.2d 633 (1965), modified the *Williams* case to the extent that service under both sentences could not exceed the maximum penalty for the particular offense. Additionally, the *Weaver* case noted that credit should be given to prevent glaring and intolerable injustice. On the other hand, State v. White, 262 N.C. 52, 136 S.E.2d 205 (1964), held that increased sentences at a second trial were permissible.

32. See Van Alstyne, *supra* note 15.

33. See cases cited at note 31 *supra*.

34. The presumption that the original sentence was a proper punishment for the particular offense first appears in Meaders v. State, 96 Ga. 299, 22 S.E. 527 (1895). It was subsequently adopted in State v. Patton, 221 N.C. 117, 19 S.E.2d 142 (1942), which Judge Craven cited.

35. The decision leaves open an interesting question as to what kind of facts will support the imposition of an increased sentence. If facts which were ignored by the prosecution at the first trial are proper as support, the state would in effect have an opportunity to correct tactical errors or omissions made at the first trial. Therefore, only facts arising since the original trial, for instance, prison conduct and attitude, should be permitted as support for the increased sentence.

36. See note 24 *supra*.

defendant's right to credit for time served will be preserved to the extent that such credit is warranted in his case.[37]

In addition to his determination that harsher penalties at a second trial may be fundamentally unfair, Judge Craven also indicated that another basis for his decision was the danger that such sentences presented to the petitioner's exercise of rights to have errors in his conviction corrected.[38] The court focused on two facts as the basis for its concern with the protection of a prisoner's right to petition for habeas corpus. The first was a survey conducted by Duke University, which demonstrated that credit for time served had been effectively denied in seventy-two percent of the cases which had been retried before the Superior Court of North Carolina.[39] The second was a letter in which a prisoner, whose conviction had been reversed, implored Judge Craven to prevent the state from bringing him to trial again for fear that a harsher sentence would be imposed.[40] From this evidence Judge Craven presumed correctly that, whether justified or not, prisoners in North Carolina would believe, especially from Patton's case, that their predecessors had been punished for exercising their right to obtain a new trial. In the light of these considerations, Judge Craven concluded "that the imposition of a harsher penalty . . . inhibits the right to petition for a new trial and unconstitutionally conditions that right."[41]

It is clear that by employing the "void" and "waiver" doctrines the courts have placed wrongfully convicted prisoners in a dilemma.[42] The possibility of receiving a harsher sentence upon reconviction will certainly inhibit petitions for a new trial and as a consequence the state will be able to prosecute an individual without being held to the requirements and limitations of the constitution. If the prisoner fears reconviction because of potentially harsher sentencing, it may be presumed that he does so in the belief that the second prosecution will succeed notwithstanding an adherence to the originally ignored guarantees. If in fact, the state can not reconvict the prisoner without ignoring his constitutional rights, the prisoner's fear of an adverse result should not be utilized to sustain the original conviction. As was noted in the *Henderson* decision, "since the state has no interest in preserving erroneous judgments, it has no interest in foreclosing appeals therefrom. . . ."[43] Therefore, while the instant case is correct in striking down as unconstitutional the practice of imposing

37. Judge Craven's ruling that harsher sentences may be imposed if the record supports them is probably a compromise offer to those who contend that increased sentences are needed to restrain the rapidly increasing number of appeals. See generally Note, 1965 DUKE L.J. 395.

38. Patton v. North Carolina, *supra* note 24, at 236.

39. *Id.* at 231 & n.6. See Note, 1965 DUKE L.J. 395.

40. Patton v. North Carolina, *supra* note 24, at 235 n.7.

41. *Id.* at 236.

42. The reasoning in People v. Henderson, 60 Cal.2d 482, 386 P.2d 677, 35 Cal. Rptr. 77 (1963), was subsequently extended to apply to all sentences and to habeas corpus petitions. See In Application of Ferguson, 233 Cal.2d 79, 43 Cal. Rptr. 325 (1965), which was adopted in State v. Wolf, 46 N.J. 301, 216 A.2d 586 (1966).

43. People v. Henderson, *supra* note 14, at 497, 386 P.2d at 686, 35 Cal. Rptr. at 92.

harsher punishment at a second trial without supporting evidence, it is submitted that a defendant's exercise of the right to seek the correction of errors in his original conviction can be effectively secured only by the imposition of an absolute restriction on the practice of increasing the original sentence.[44] Under no circumstances should an individual be compelled to expose himself to the danger of receiving a harsher sentence as the price of exercising the right to appeal from an improper conviction.

Edward J. David

FEDERAL COURTS — REVIEW OF TRANSFER ORDERS — DISTRICT COURT'S EVALUATION OF PROPER FACTORS IN GRANTING OR DENYING TRANSFER OF VENUE IS REVIEWABLE BY MANDAMUS PROCEEDING; AN INTERLOCUTORY APPEAL IS UNAVAILABLE.

A. Olinick & Sons v. Dempster Bros. (2d Cir. 1966)

Petitioner, a New York corporation, initiated a breach of warranty action against respondent, a Tennessee corporation, in a New York state court. Respondent obtained removal of the action to the Federal District Court for the Eastern District of New York and then moved, under the provisions of section 1404(a) of the Judicial Code,[1] that the case be transferred to the Eastern District of Tennessee. The district court, emphasizing that the respondent expected to call more witnesses and that the case would proceed to trial far more quickly in Tennessee, ordered the case transferred. The New York district court, pursuant to section 1292(b) of the Judicial Code,[2] then certified that it considered the order appropriate for interlocutory appeal. Petitioner, conceding that the district court had

44. *Cf.*, Fay v. Noia, 372 U.S. 391 (1963); Hetenyi v. Wilkins, 348 F.2d 844 (2d Cir. 1965).

1. 28 U.S.C. § 1404(a) (1964): "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

2. 28 U.S.C. § 1292(b) (1964):
When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

considered the proper factors in deciding the transfer motion but arguing that these factors had been erroneously evaluated, sought review by leave to appeal pursuant to section 1292(b) or, in the alternative, for a writ of mandamus as provided in section 1651(a) of the Judicial Code,[3] ordering the New York district court to vacate its transfer order. The United States Court of Appeals for the Second Circuit refused to allow the appeal, *holding:* (1) section 1292(b) does not allow an interlocutory appeal to secure review of the grant or denial of section 1404(a) transfer motions for alleged incorrect evaluation of proper factors by the district court; and (2) while the courts of appeals are possessed of the power to issue writs of mandamus to correct the disposition of a transfer motion by the district court, the instant case did not require the exercise of this power. *A. Olnick & Sons v. Dempster Bros.,* 365 F.2d 439 (2d Cir. 1966).

The touchstone of appealability in the federal courts[4] is the final judgment rule as presently embodied in section 1291 of the Judicial Code.[5] However, the existence of recurring situations where appellate review postponed until a final judgment had been rendered would result in irreparable injury[6] has impelled legislative and judicial exceptions to the final judgment rule. Judicially, the landmark cases of *Forgay v. Conrad*[7] and *Cohen v. Beneficial Industrial Loan Corp.,*[8] wherein certain "non-final" orders received appellate review, manifest an exception to the final judgment rule. Legislatively, sections 1292[9] and 1651[10] of the Judicial Code provide avenues for avoidance of the rule by allowing interlocutory appeals in certain circumstances.

Analytically, a discussion of the availability of appellate review of transfer orders before final judgment should focus on and resolve the following: (1) The desirability of immediate appellate review of these orders; and (2) the appropriate method — by appeal or otherwise — of immediate review. In the instant case the Court of Appeals for the Second Circuit impliedly conceded the desirability of immediate review of transfer orders by focusing its attention on whether an interlocutory appeal or mandamus is the appropriate method of review.

Section 1404(a)[11] indicates that transfer of venue will be appropriate if, and only if, two tests are met: (1) the transfer must be "for the

3. 28 U.S.C. § 1651(a) (1964): "The Supreme Court and all courts established by Act of Congress may issue all writs necessary to appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

4. See generally Note, *Appealability In the Federal Courts,* 75 HARV. L. REV. 351 (1961).

5. 28 U.S.C. § 1291 (1958): "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court."

6. *E.g.,* 4 MOORE, FEDERAL PRACTICE ¶ 54.04 (2d ed. 1965); Note, *Appealability In the Federal Courts,* 75 HARV. L. REV. 351, 352 (1961); Note, *Section 1292(b): Eight Years of Undefined Discretion,* 54 GEO. L.J. 940, 941 (1966).

7. 47 U.S. (6 How.) 201 (1848).

8. 337 U.S. 541 (1949).

9. 28 U.S.C. § 1292 (1964).

10. 28 U.S.C. § 1651 (1964).

11. See note 1 *supra.*

convenience of parties and witnesses" and "in the interest of justice"; and (2) the transfer must be to a district or division where the action "might have been brought."[12] Both tests necessitate consideration by the district court of certain factors before ruling on a transfer motion; application of the former test being less subject to objective measurement than the latter. Though a 1404(a) order granting or denying transfer is not considered final,[13] immediate appellate review of the order, either by mandamus[14] or pursuant to section 1292(b),[15] can generally be obtained where it is alleged that the district court erred with respect to the latter (jurisdictional) test. The first test, however, has been widely recognized to vest considerable discretion in the district court, although certain factors have been enumerated which are to be considered in deciding upon the propriety of a transfer order.[16] The ensuing discussion of the desirability and mode of appellate review of transfer orders will be confined to those orders not involving jurisdictional questions where the district court has come to a conclusion granting or denying the transfer after evaluating the ordained factors.

The desirability of immediate appellate review of transfer orders can best be shown by considering the inadequacy of appellate review of these orders at the conclusion of the action. One commentator has concluded:

> Review of 1404(a) orders at the conclusion of an action does not adequately protect litigants. If a party can afford the increased expense caused by an erroneous transfer order, ultimate appeal offers him no opportunity to recoup. If such expense makes prosecution or defense of an action economically unfeasible, the resulting default or dismissal bars a hearing on the merits. Moreover, a party whose case has been prejudiced by his inability to require the personal appearance of a witness because of a 1404(a) order generally cannot show harmful error.[17]

12. In Hoffman v. Blaski, 363 U.S. 335 (1960), the United States Supreme Court construed this phrase to mean that the transferee district must be one in which the plaintiff would have had a right to sue, independently of the wishes of the defendant, at the time the action was originally commenced. This phrase was further explained in Van Dusen v. Barrack, 376 U.S. 612 (1964). See also Kitch, *Section 1404(a) Of the Judicial Code: In The Interest Of Justice Or Injustice?*, 40 IND. L.J. 99, 100 (1965). See generally 1 MOORE, FEDERAL PRACTICE ¶ 0.145 [6.-1] (2d ed. 1965).

13. See 1 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 86.7 n.89 (Wright ed. 1960).

14. *Id.* § 86.7 n.89.5.

15. *Id.* § 86.7 n.89.3. That § 1292(b) was designed to cover a § 1404(a) order when the jurisdictional aspect is in question is evidenced by the testimony of Judge Parker at hearings held before subcommittee No. 3 of the House Committee on the Judiciary (85th Cong., 2d Sess., ser. 11 at 18 (1958)), when he pointed out that when an order transferring the place of trial is challenged on the ground that the transferee court lacks venue, an immediate appeal might be appropriate. See also Note, *Section 1292(b): Eight Years Of Undefined Discretion*, 54 GEO. L.J. 940, 943 (1966).

16. See 1 MOORE, FEDERAL PRACTICE ¶ 0.145[5] (2d ed. 1964) for an exhaustive list of these factors. See also Kitch, *supra* note 12, at 131–37. The district court's failure to consider a proper factor or consideration of an improper factor will generally give rise to immediate appellate review in a mandamus proceeding. See 1 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 86.7 n.89.5 (Wright ed. 1960).

17. Note, *Appealability Of 1404(a) Orders: Mandamus Misapplied*, 67 YALE L.J. 122, 124 & nn.9–11 (1957). (Footnotes omitted.)

The possible existence of these hardships militates strongly for the adoption of some immediate means of reviewing a transfer order where the district court considered the proper factors but allegedly arrived at an erroneous order. To deny a means of immediate review in these circumstances would be to elevate the district court's discretion to a virtually invulnerable position.[18]

The court in the instant decision dealt with two possible modes of reviewing a transfer order when the district court's evaluation of proper factors is questioned: (1) interlocutory appeal pursuant to section 1292(b); and (2) a mandamus proceeding pursuant to section 1651(a). In dismissing the applicability of section 1292(b), the Second Circuit established a standard for future litigants desiring interlocutory review of the district court's evaluation of proper factors in granting or denying a transfer order. This standard is that any interlocutory review of that evaluation will be exclusively by petition for a writ of mandamus. By so doing, the Second Circuit aligned itself with the Third and Sixth Circuits in denying the use of section 1292(b) to rectify an incorrect evaluation of proper factors by the district court in deciding a transfer of venue motion.[19] The Fifth Circuit, on the other hand, has permitted the use of section 1292(b) for this purpose.[20]

Before an order can qualify under section 1292(b)[21] it must be one which in the opinion of the district court: (a) involves a controlling question of law; (b) offers substantial ground for difference of opinion as to its correctness; and (c) will materially advance the ultimate termination of the litigation if immediately appealed. Upon concluding that the order under consideration qualifies, the district court certifies to the circuit court that the order fulfills the statutory criteria. The circuit court upon receiving this certification may in its discretion grant or deny leave to appeal. With regard to transfer orders for which review is sought solely on the district court's evaluation of proper factors, the Second, Third and Sixth Circuits have held that the order is one which could not be properly certified because of a failure to meet one or all of the above statutory criteria. The exercise of discretion permitted by the statute was therefore unnecessary. The Fifth Circuit, on the other hand, in permitting the use of section 1292(b) in these circumstances, has accepted the district court's certification without question. Once the order is certified, the court exercises

18. See 1 MOORE, FEDERAL PRACTICE § 0.147, at 1971 (2d ed. 1964). *But see* Kitch, *supra* note 12, at 141–43, where the commentator concludes "[A]ppellate intervention in the transfer process in turn entails such a substantial burden of delay that it outweighs the advantages of [section 1404(a)]."

19. Standard v. Stoll Packing Corp., 315 F.2d 626 (3d Cir. 1963); Bufalino v. Kennedy, 273 F.2d 71 (6th Cir. 1959).

20. Koehring Co. v. Hyde Constr. Co., 324 F.2d 295 (5th Cir. 1963), 348 F.2d 643 (1965), *rev'd on other grounds*, 382 U.S. 362 (1966); Humble Oil & Ref. Co. v. Bell Marine Serv., Inc., 321 F.2d 53 (5th Cir. 1963).

21. See note 2 *supra*.

its discretion and usually reviews the order. Logically, one would assume that in accepting the district court's certification and granting leave to appeal under section 1292(b), the circuit court has impliedly held that the order under consideration has fulfilled the statutory prerequisites and was proper for certification. However, from all indications, the Fifth Circuit now permits appeal under the section without first determining that the district court's certification was proper. This leaves open the possibility that should the Fifth Circuit be confronted in an adversary proceeding with the propriety of the district court's certification of a transfer order based on the district court's evaluation of proper factors, it will reach a holding similar to that of the Second, Third and Sixth Circuits. In this respect, the alleged split among the circuits may be illusory.[22] If the Fifth Circuit rules in conformity with the Second, Third and Sixth with regard to discretionary transfer orders, it is conceivable that another conflict with regard to discretionary discovery orders and the applicability of section 1292(b) will also be resolved.[23] If and when the Fifth Circuit does review the certification of the district court of an order granting or denying transfer based solely on the district court's evaluation of proper factors, the precedent of the Second, Third and Sixth Circuits, as well as the opinion of Judge Wright in *Deepwater Exploration Co. v. Andrew Weir Ins. Co.*[24] interpreting the Congressional intent behind section 1292(b), should compel a result in accord with the majority.[25]

The other mode of review discussed and approved in the instant case for interlocutory review of the district court's evaluation of proper factors in granting or denying a transfer order is a mandamus proceeding. Generally, the circuit courts consider themselves possessed of the power[26] to issue the writ but are careful to restrict the exercise of this power to those cases where there was a "clear abuse of discretion"[27] or in "really extraordinary situations."[28]

The question of the power of a circuit court to review the district court's evaluation of proper factors in granting or denying a transfer order is by no means in a state of unanimity among the various circuits

22. This conclusion is supported by Humble Oil & Ref. Co. v. Bell Marine Serv., Inc., 321 F.2d 53, 55 & n.5 (5th Cir. 1963). In Deepwater Exploration Co. v. Andrew Weir Ins. Co., 167 F. Supp. 185 (E.D. La. 1958), the district court refused to certify a transfer order based on an evaluation of proper factors stating that the order did not fulfill the statutory criteria because it was not within the legislative intent for the statute to encompass this type of order. In spite of this opinion, the Fifth Circuit has continued to use § 1292(b) for this type of discretionary order without resolving the correctness of the *Deepwater* opinion.

23. See Allis Chalmers Mfg. Co. v. City of Fort Pierce, 323 F.2d 233 (5th Cir. 1963); *contra*, Atlantic City Elec. Co. v. A. B. Chance Co., 313 F.2d 431 (2d Cir. 1963).

24. 167 F. Supp. 185 (E.D. La. 1958).

25. See also Note, *Discretionary Appeals of District Court Interlocutory Orders: A Guided Tour Through Section 1292(b) Of The Judicial Code*, 69 YALE L.J. 333, 350–51 (1959); See generally Note, *Section 1292(b): Eight Years Of Undefined Discretion*, 54 GEO. L.J. 940 (1966).

26. See A. Olinick & Sons v. Dempster Bros., 365 F.2d 439, 443 (2d Cir. 1966).

27. Goranson v. Kloeb, 308 F.2d 655, 657 (6th Cir. 1962).

28. *In re* Josephson, 218 F.2d 174, 183 (1st Cir. 1954).

or for that matter within the circuits.[29] In his concurring opinion in the instant case, Judge Friendly stated:

> [O]ur power to issue mandamus is limited to those cases . . . where a district judge has denied a transfer motion without even considering the merits or has granted or denied one in such flagrant defiance of accepted principles as to evidence impermissible motivation.[30]

He further said: "I therefore concur in denying the writ, but on the basis that the petition seeks relief beyond our power to grant."[31] A position such as that advocated by Judge Friendly would foreclose any chance of reviewing a district court's evaluation of proper factors, even where that evaluation was "clearly erroneous." Such an inflexible position is undesirable.[32]

Practically, the use of the writ seems to offer an expedient mode of review for a transfer of venue order when the district court's evaluation of proper factors is in question. The circuit court could consider the factors which were considered by the district court and, if no abuse of discretion is found, summarily deny the writ. If, on the other hand, "clear abuse" of discretion is found, an opinion should be rendered setting forth the reasons for reversing the district court. The cases indicate that appellate courts are constrained not to overrule the district court's discretion[33] so this procedure would seem to promote efficiency, and to undermine possible dilatory tactics when the petition is clearly without merit.[34]

The modes of review suggested by the courts, Congress and the commentators have as their objective a desire to avoid the final judgment rule when a "hardship" order is "clearly erroneous." That a transfer order

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29. See generally 1 MOORE, FEDERAL PRACTICE ¶ 0.147 (2d ed. 1954).

30. A. Olinick & Sons v. Dempster Bros., 365 F.2d 439, 446 (2d Cir. 1966).

31. *Id.* at 448. Recently, in Van Dusen v. Barrack, 376 U.S. 612 (1964), the Solicitor General had an excellent opportunity to put in issue the jurisdiction (power) of a circuit court to correct by a writ of mandamus an erroneous district court determination of the convenience of the parties and witnesses and the interest of justice. Unfortunately, the Solicitor General did not argue the point. The thrust of recent Supreme Court holdings, however, seems to have expanded the availability of mandamus as a source of interlocutory review. See generally 6 MOORE, FEDERAL PRACTICE ¶ 54.10(4) (2d ed. 1965).

32. See text accompanying note 18 *supra.*

33. For the handful of cases in which the district court was reversed, see A. Olinick & Sons v. Dempster Bros., 365 F.2d 439 n.2, at 444 (1966).

34. Two additional approaches to the review of transfer orders have been suggested. In Rapp v. Van Dusen, Civil No. 14927, 3d Cir., Dec. 16, 1964 (en banc), *vacated and modified on rehearing,* 350 F.2d 806 (1965), the Third Circuit originally stated: "Proper practice requires that in cases such as review of an order of transfer the petitioners should apply for a rule directed to the prevailing parties to show cause why the order entered in their favor should not be vacated and set aside." This unique approach was abandoned on rehearing in favor of a modified mandamus proceeding whereby the judge below, although named as a respondent, is deemed only a nominal party and the prevailing parties in the challenged decision are deemed to be respondents and permitted to answer the petition. Finally, in Note, *Appealability of 1404(a) Orders: Mandamus Misapplied,* 67 YALE L.J. 122 (1957), the commentator concludes that a transfer order fulfills the criteria of the collateral order doctrine established in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949), and that the appropriate method of review is interlocutory appeal pursuant to this doctrine. *But see* 6 MOORE, FEDERAL PRACTICE ¶ 54.14, at 140–41 (2d ed. 1965).

frequently can work irremediable hardship on a litigant has been clearly established.[35] It is therefore desirable for counsel to have means available to combat arbitrary or "clearly erroneous" orders of the district court. This method, to be effective, must be available for use immediately after the issuance of the transfer order. To promote judicial economy, it would seem expedient for the courts to treat their interlocutory power to review by mandamus in much the same way as the Supreme Court treats petitions for certiorari. An administration in this manner would aid in the realization of the underlying objectives of section 1404(a).

Robert B. White, Jr.

TORTS — DEFAMATION BY LIBEL — SHOWING OF SPECIAL DAMAGES NOT REQUIRED IN AN ACTION FOR LIBEL PER QUOD.

Hinkle v. Alexander (Ore. 1966)

Defendant, the proprietor of a restaurant and boarding house in Estacada, Oregon, which was patronized by loggers who worked in the area, made a practice of extending credit to the loggers whose employers agreed to guarantee the payment of their employees' bills. Plaintiff employed a number of loggers, one of whom obtained credit from the defendant although the plaintiff had not consented to pay that employee's bill. After the employee failed to pay a portion of his bill, the defendant requested payment from the plaintiff who declined to pay. The defendant then posted the bill in his place of business with the words "Wayne Hinkle [the plaintiff] owes this to us" written on its face.

Plaintiff brought an action to recover damages for the alleged libel. The jury rendered a verdict for the plaintiff, but the trial court granted a motion for judgment n.o.v. on the ground that the plaintiff had failed to allege special damages as required for libel other than libel *per se*.[1] On appeal, the plaintiff submitted that the defamatory words were actionable *per se*, and therefore that he was not required to allege special damages. The Supreme Court of Oregon initially affirmed,[2] relying on *Hudson v. Pioneer Serv. Co.*,[3] where it had decided that publication of the non-

35. See text accompanying notes 18–20 *supra*.

1. Note, *Libel Per Se and Special Damages*, 13 VAND. L. REV. 730 (1960). If the libelous words are defamatory on their face, they are libelous *per se*. If the words are actionable only in the light of extrinsic facts they are libelous *per quod*. *Supra* at 731.

2. 411 P.2d 829 (Ore. 1966).

3. 218 Ore. 561, 346 P.2d 123 (1959).

payment of a debt is not libelous *per se*. On rehearing, the Oregon Supreme Court reversed its earlier decision and reinstated the jury verdict,[4] *holding* that a showing of special damages is no longer required in an action to recover for a libel *per quod*.[5]

The modern law of defamation has evolved from two distinct sources. Slander, or verbal defamation, arose in the early ecclesiastical courts where it was treated as a sin.[6] Actions for libel, or written defamation, were originally prosecuted as criminal actions in the Star Chamber to quash political opposition.[7] When the common law courts began to hear actions for slander, they required a showing of pecuniary damages unless the slander was a slander *per se*.[8] To constitute slander *per se*, the words must have imputed the commission of a serious crime,[9] adversely affected the plaintiff in his business, trade or profession,[10] imputed that the plaintiff had certain loathesome diseases,[11] or, more recently, imputed unchastity to a woman.[12] All other slander was denominated slander *per quod* and required a showing of special damages.[13]

When the common law courts took over libel jurisdiction from the Star Chamber, they continued, however, to hold written defamation actionable without proof of special damages.[14] Thus, the *per quod* and *per se* rules applicable to pleading damages in slander were not considered in actions for libel. Until the late 19th Century[15] this rule was consistently applied both in England[16] and in America[17] without regard to whether the statement was defamatory on its face or required evidence of special damages to establish the libel.[18]

However, certain American courts confused the rules of libel with those of slander and began to recognize a previously unknown action, libel *per quod*.[19] Thus, in those jurisdictions which applied the rules of slander

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4. ____ Ore. ____, 417 P.2d 586 (Ore. 1966).
5. *Id.* at 590.
6. See *Developments in the Law — Defamation*, 69 HARV. L. REV. 875, 887 (1956); Note, *The Doctrine of Libel Per Se in Ohio*, 9 W. RES. L. REV. 43, 44 (1957).
7. *Ibid.*
8. See *Developments in the Law — Defamation*, *supra* note 6.
9. *E.g.*, Buckley v. O'Neil, 113 Mass. 193 (1873); Martin v. Stillwell, 13 Johns 275 (N.Y. 1816); Brooker v. Coffin, 5 Johns 188 (N.Y. 1809).
10. *E.g.*, Cruikshank v. Gordon, 118 N.Y. 178, 23 N.E. 457 (1890); Fowles v. Bowen, 30 N.Y. 20 (1864).
11. *E.g.*, Golderman v. Stearns, 73 Mass. 181 (1856); Taylor v. Perkins, Cro. Jac. 144, 79 Eng. Rep. 126 (K.B. 1607).
12. *E.g.*, Crellin v. Thomas, 122 Utah 122, 247 P.2d 264 (1952); Biggerstaff v. Zimmerman, 108 Colo. 194, 114 P.2d 1098 (1941).
13. See, Note, *Libel Per Se and Special Damages*, *supra* note 1, at 730.
14. Thorley v. Kerry, 4 Taunt. 335, 128 Eng. Rep. 367 (1812). See also Note, *Libel Per Se and Special Damages*, *supra* note 1, at 730.
15. See, *e.g.*, King v. Lake, Hardres 470, 145 Eng. Rep. 552 (1670); Thorley v. Kerry, 4 Taunt. 335, 128 Eng. Rep. 367 (1812). See also PROSSER, TORTS 783 (3d ed. 1964).
16. Thorley v. Kerry, 4 Taunt. 335, 128 Eng. Rep. 367 (1812).
17. See PROSSER, TORTS 780 (3d ed. 1964).
18. See Note, *Libel Per Se and Special Damages*, *supra* note 1, at 731.
19. *E.g.*, Fry v. McCord, 95 Tenn. 678, 33 S.W. 568 (1895). In actions for libel *per quod* the courts require proof of special damages just as they do in actions for slander *per quod*.

per quod to actions for libel, unless the libel constituted libel *per se*,[20] it was held to be a libel *per quod* requiring proof of special damages.[21]

Prior to the decision in the instant case, the Oregon courts had followed the *per quod* rule in actions for libel.[22] In this case, however, the court reconsidered the question of whether to apply the old common law rule as adopted by the *Restatement of Torts*[23] or the so-called American rule.[24] In making this determination the court took cognizance of the present conflict of authority as represented by the respective arguments of Dean Prosser and Mr. Eldredge.[25]

Dean Prosser has maintained that allegation and proof of special damages in actions to recover for a libel *per quod* is required by thirty-five states,[26] and that only eight jurisdictions follow the older English rule.[27] He advocates the adoption of the requirement of proving special damages in actions for libel *per quod*,[28] and further argues that a libel which requires proof of extrinsic facts is incomplete; unless the facts which make the

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20. See notes 9–12 *supra* and accompanying text.

21. See cases cited at 9–12 and 19 *supra*.

22. Ruble v. Kirkwood, 125 Ore. 316, 266 Pac. 252 (1928).

23. The common law rule has been adopted by the RESTATEMENT, TORTS § 569 (1938), which provides: "One who falsely, and without a privilege to do so, publishes matter defamatory to another in such a manner as to make the publication a libel is liable to the other although no special harm or loss of reputation results therefrom."

Comment (c) of § 569 explains: "The publication of any libel is actionable per se, that is irrespective of whether any special harm has been caused to the plaintiff's reputation or otherwise."

24. See PROSSER, TORTS 780–83 (3d ed. 1964); Prosser, *More Libel Per Quod*, 79 HARV. L. REV. 1629 (1966); Prosser, *Libel Per Quod*, 46 VA. L. REV. 839 (1960). The American rule requires that special damages be alleged and proved in any action for libel where the defamatory meaning is apparent only in light of extrinsic facts.

25. Dean Prosser has argued that recovery may be had only for libel *per se* without proof of special damages in the majority of U.S. jurisdictions and that the *Restatement* should adopt this view. See Prosser, *More Libel Per Quod*, 79 HARV. L. REV. 1629 (1966); PROSSER, TORTS 782 (3d ed. 1964); Prosser, *Libel Per Quod*, 46 VA. L. REV. 839, 849–50 (1960).

Laurence H. Eldredge, a member of the Pennsylvania Bar and an Adviser and former Revising Reporter on Torts for the American Law Institute, has defended the current *Restatement* position. See Eldredge, *The Spurious Rule of Libel Per Quod*, 79 HARV. L. REV. 733 (1966).

26. See PROSSER, TORTS 782 (3d ed. 1964).

27. *Id.* at 781. The jurisdictions listed are the United States (federal common law), Delaware, Iowa, Minnesota, Mississippi, New Jersey, Wisconsin, and Texas. Prosser considered New York to be in a state of fluctuation and confusion.

28. Prosser, *More Libel Per Quod*, *supra* note 25, at 1629; Prosser, *Libel Per Quod*, *supra* note 25, at 839. Dean Prosser has suggested that § 569 of the *Restatement* be amended as follows:

Liability Without Proof of Special Harm

(1) One who publishes defamatory material is subject to liability without proof of special harm or loss if the defamation is
   (a) Libel whose defamatory meaning is apparent from the publication itself without reference to extrinsic facts, or
   (b) Libel or slander which imputes to another
      (i) A criminal offense, as stated in § 571,
      (ii) A loathesome disease, as stated in § 572,
      (iii) Matter incompatible with his business, trade, profession or office, as stated in § 573, or
      (iv) Unchastity on the part of a woman, as stated in § 574.

(2) One who publishes any other libel or slander is subject to liability only upon proof of special harm, as stated in § 575.

Prosser, *Libel Per Quod*, *supra* note 25, at 850.

material defamatory are a part of the publication, the rules of slander should be applied.[29] The best rationale for the *per quod* rule, however, was stated by Justice Traynor in *MacLeod v. Tribune Publishing Co.*[30] where he suggested that the rule protects the news media from harassment by trifling claims of libel.[31]

Mr. Eldredge maintains that "those appellate courts that have analyzed the problem and ruled squarely on the question of proof required to recover in cases in which libel by extrinsic facts is alleged, have all accepted section 569 as sound law . . ."[32] Mr. Eldredge refers to cases in nine states including, Pennsylvania, Massachusetts and New Jersey, which, since the adoption of the *Restatement* in 1938, have cited and accepted section 569.[33] Only two states, Arizona[34] and New Mexico,[35] have actually held that the plaintiff must prove special damages to recover for a libel *per quod*. After a comprehensive analysis of the rules applied in American jurisdictions, Mr. Eldredge concludes that the weight of authority is with the view adopted by section 569 of the *Restatement*.[36] He disagrees with Dean Prosser's position that libel provable by extrinsic facts is less serious because those facts may be expected to be known only to relatively few people.[37]

Even in those jurisdictions which nominally follow the *per quod* rule, the courts seem to be more interested in a just result than in strict adherence to the rule. In New York, for example, in *Hinsdale v. Orange Co. Publications*,[38] the court side-stepped the *per quod* rule and held for the plaintiff on the ground that the material was libel *per se* even though extrinsic circumstances were necessary to prove the libel. As the instant case holds, if the plaintiff is defamed he should be entitled to redress,[39] regardless of whether the defamation is labeled *per se* or *per quod*.[40]

Although Dean Prosser and Mr. Eldredge are both concerned with the numerical line-up of the courts, the courts should adhere to the most

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29. PROSSER, TORTS 782 (3d ed. 1964).

30. 52 Cal. 2d 536, 343 P.2d 36 (1959).

31. 52 Cal. 2d 536, 550, 343 P.2d 36, 43–44 (1959). Even this rationale is unimpressive in Oregon because of a retraction statute which permits the news media to escape liability if they publicly retract allegedly libelous material they have published. Ore. Rev. Stat. § 30.150 (1965 Supp.). See also Hinkle v. Alexander, ____ Ore. ____, 417 P.2d 586, 589 (1966).

32. Eldredge, *supra* note 25, at 735.

33. *Id.* at 743 & nn. 27–35.

34. Ilitzky v. Goodman, 57 Ariz. 216, 112 P.2d 860 (1941).

35. Chase v. New Mexico Publishing Co., 53 N.M. 145, 203 P.2d 594 (1949).

36. Eldredge, *supra* note 25, at 754.

37. One of the specific problems the law of libel is intended to obviate, as pointed out by Mr. Eldredge, is the yellow journalism which makes statements not defamatory on their face, but which take into account extrinsic facts known to its readers. *Id.* at 755.

38. Hinsdale v. Orange Co. Publications, 17 N.Y.2d 274, 217 N.E.2d 650, 270 N.Y.S.2d 586 (1966).

39. Hinkle v. Alexander, ____ Ore. ____, 417 P.2d 586, 590 (Ore. 1966).

40. *Ibid.*

logical and most practical rule, not the most popular. The only rationale for requiring proof of special damages when the defamatory meaning does not appear on the face of the language is to protect publishers who made innocent statements which become defamatory only because of extrinsic facts known to some readers.[41] However, a device such as a retraction statute[42] would afford the necessary protection to innocent publishers without denying a defamed plaintiff the right to recover.[43]

The traditional distinction between libel *per quod* and libel *per se* is outdated as are the distinctions between libel and slander. Certainly the radio and television media which broadcast the spoken word have at least as much impact upon the public as the newspapers and other written media. It is submitted that the old distinctions between libel and slander should be abolished,[44] and that such a combined tort should be actionable whenever there has been a public defamation.[45] If the defamation is not "public" in nature, recovery should be allowed only upon proof of special damages. Such a test would provide recovery to the defamed plaintiff, and, at the same time, would discourage petty spite suits where recovery could be had only upon proof of special damages.

C. William Kraft, III

TORTS — LIABILITY OF SUPERMARKET — TRIER OF FACT CAN INFER NEGLIGENCE FROM PRESENCE OF FLOOR DEBRIS CAUSING INJURY.

Wollerman v. Grand Union Stores, Inc. (N.J. 1966)

Plaintiff slipped and fell consequent to stepping on a string bean while shopping in the produce section of defendant's supermarket. At trial, plaintiff failed to adduce proof of how the bean came to be on the floor, the duration of its repose, or that defendant knew or should have known that the bean was on the floor. Defendant's motion for involuntary

41. MacLeod v. Tribune Publishing Co., 52 Cal. 2d 536, 343 P.2d 36 (1959). See also Prosser, *More Libel Per Quod, supra* note 25, at 1646.

42. Statute cited note 31 *supra.*

43. See *supra* note 37.

44. See, *e.g.*, PROSSER, TORTS 783 (3d ed. 1964).

45. PROSSER, TORTS 784 (3d ed. 1964).

dismissal made at the conclusion of plaintiff's presentation was granted and affirmed by the Superior Court, Appellate Division.[1] The Supreme Court of New Jersey reversed and remanded for a new trial, *holding* that where a substantial risk of injury is implicit in the manner in which a business is conducted, and it is fairly probable that the operation is responsible for creating the hazard or permitting it to arise or continue, the trier of fact may infer that the operator was negligent. *Wollerman v. Grand Union Stores, Inc.*, 47 N.J. 426, 221 A.2d 513 (1966).

An occupier's duty of due care to an invitee encompasses both the duty to avoid negligent activity injurious to the invitee and the affirmative burden to discover and warn of latent perils. Accordingly, an occupier must inspect his premises and remedy dangerous conditions.[2] The invitor is not an insurer,[3] however, and breaches of his duty must usually be established in cases similar to *Wollerman* by proof not only that a dangerous floor condition existed, but that the proprietor negligently created the condition[4] or had actual or constructive notice of its existence.[5] Res ipsa loquitur is generally inapplicable[6] since, although the circumstances may point to someone's negligence, the technical requirements of that doctrine do not allow the negligence to be necessarily imputed to the defendant.[7]

The court in the instant case admitted that absent proof of actual or constructive notice of the hazard or proof of negligent conduct attributable to the proprietor, the prevailing approach would dictate that the plaintiff be nonsuited. Positing that defendant's merchandising techniques had created the likelihood that some produce would be dropped or fall to the floor, the court reasoned that he must do what is reasonably necessary to protect his customers from the hazards engendered by the mode of operation, whether the particular risk arises from the act of either an employee or another invitee. It is foreseeable that other customers as well as

1. Unreported.

2. 2 HARPER & JAMES, TORTS 1487 (1956).

3. See, *e.g.*, Miller v. Hickey, 368 Pa. 317, 324, 81 A.2d 910, 914 (1951).

4. Heina v. Broadway Fruit Market, Inc., 304 Mass. 608, 24 N.E.2d 510 (1939); Sears, Roebuck & Co. v. Peterson, 76 F.2d 243 (8th Cir. 1935).

5. Hale v. Safeway Stores, Inc., 129 Cal. App. 2d 124, 276 P.2d 118 (1954) (elapsed sweeping time); Morris v. King Cole Stores, Inc., 132 Conn. 489, 45 A.2d 710 (1946) (condition of substance that caused the fall); Moore v. American Stores Co., 169 Md. 541, 182 Atl. 436 (1936) (condition of grease on floor); Hudson v. F. W. Woolworth Co., 275 Mass. 469, 176 N.E. 188 (1931) (dirty piece of candy on the floor). Circumstantial evidence can be used to establish that the dangers existed, and that defendant knew or should have known of the hazard and taken steps to remove it.

6. Sweeney v. Erving, 228 U.S. 233 (1913); Garland v. Furst, 93 N.J.L. 127, 107 Atl. 38 (Ct. Err. & App. 1919). The conditions stated as necessary for the application of the principle of *res ipsa loquitur* are: (1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff. PROSSER, TORTS 218 (3d ed. 1964).

7. See, *e.g.*, Tiberi v. Fisher Bros., 96 Ohio App. 302, 121 N.E.2d 694 (1953).

employees will drop greens on the floor, and the defendant can be liable without proof of notice if he failed to use measures commensurate with this risk, including reasonable inspection procedures[8] and protection from dangerous conditions inherent in the nature of the business.[9]

Thus, actual or constructive notice and a subsequent failure to act is only one hypothesis upon which defendant's negligence can be predicated. The court reasoned that when the probability that another customer dropped the bean so near the moment of the accident that defendant could not, even if vigilant, have safeguarded the plaintiff is outweighed by acceptable hypotheses from which the jury could infer that the injury was caused by a breach of duty owed by the defendant, it is not unjust to require defendant to come forward with evidence of the precautionary measures he had taken. Underlying this reasoning is a recognition of an injured plaintiff's frequent inability to demonstrate the sequence of events which resulted in the presence of the slip-and-fall causative substance. Under heretofore existing doctrine, supermarkets have been effectively insulated from liability for such injuries because of this difficulty which confronts an injured plaintiff. The instant decision, in offering the plaintiff a solution to this problem, does not make the self-service market proprietor an insurer. The plaintiff's proof merely raises an inference of negligence which may be disregarded by the jury,[10] and would not entitle plaintiff to a directed verdict if defendant did not offer evidence of due care; the burden of proof remains on the plaintiff.[11] The defendant is merely required to explain, not exculpate.[12]

The instant decision was not without supporting precedent. In *Francois v. American Stores Co.*,[13] the New Jersey Superior Court, applying res ipsa loquitur, took judicial notice that a customer shopping in a self-service market is invited to select his merchandise from the store shelves. By encouraging this potentially hazardous practice, the invitor assumes a duty of special vigilance which functionally demands the taking of high precautions.[14] In a later case, decided by the Supreme Court,[15]

8. Simpson v. Duffy, 19 N.J. Super. 339, 349, 88 A.2d 520, 525 (App. Div. 1952).

9. Bozza v. Vornado, Inc., 42 N.J. 355, 200 A.2d 777 (1964).

10. See, *e.g.*, Wildauer v. Rudnevitz, 119 N.J.L. 471, 473, 197 Atl. 252, 253 (Ct. Err. & App. 1938).

11. See Cleary v. City of Camden, 118 N.J.L. 215, 224, 192 Atl. 29, 34 (Sup. Ct. 1937).

12. Kahalili v. Rosecliff Realty, Inc., 26 N.J. 595, 606, 141 A.2d 301, 307 (1958). The phrase, "it is the duty of defendant to go forward with his proof," has been described as meaning that if defendant expects a favorable jury verdict he should introduce evidence explaining his due care, and not that any burden of proof rests on the defendant. Harris v. Mangum, 183 N.C. 235, 238, 111 S.E. 177, 178 (1922).

13. 46 N.J. Super. 394, 134 A.2d 799 (App. Div. 1957) (stacked cans fell on customer in a supermarket).

14. *Id.* at 398, 134 A.2d at 801.

15. Bozza v. Vornado, Inc., 42 N.J. 355, 200 A.2d 777 (1964) (slip and fall injury in a self-service cafeteria).

it was held that the plaintiff is relieved of proving actual or constructive notice when he shows that the circumstances were such as to create a reasonable probability that a dangerous condition would occur from activities attendant to the premises. Factors found relevant by the court included the nature of the business, the general condition of the premises, and a pattern of conduct or recurring incidents.[16]

The plaintiff's case in *Wollerman* consisted solely of circumstantial evidence, but the court did not deviate from the traditional view that the res ipsa loquitur doctrine is inapplicable in this situation.[17] The exclusive control requirement of res ipsa loquitur supplies the necessary causative nexus between defendant and plaintiff's injuries,[18] and consequently when the doctrine is applicable the plaintiff must only show the physical cause of the accident; where it is inapplicable, as in the principal case, the plaintiff must offer evidence tending to prove both the physical and responsible human cause of his injuries. This requirement can now be satisfied, in cases similar to *Wollerman,* by proof that "a substantial risk of injury is implicit in the manner in which a business is conducted. . . ."[19]

The plaintiff does not have to isolate the precise breach of duty that caused injury in a circumstantial evidence case, but the mere possibility of defendant's negligence as a causative factor is not enough — the jury should not be allowed to speculate.[20] The evidence must be such as to justify a legitimate inference of probability.[21] Harper and James suggest that an inference will not be legitimate when:

> [W]here from the facts most favorable to the plaintiff the nonexistence of the fact to be inferred is just as probable as its existence . . . the conclusion that it exists is a matter of speculation . . . and a jury will not be permitted to draw it.[22]

However, the plaintiff is not required to eliminate every other possible cause,[23] nor provide a rational basis for the conclusion that it is somewhat more probable than not that his hypothesis is correct in order to have his case submitted to the jury.[24] It is the province of the jury, where different inferences may be drawn from the evidence, to draw the inference.[25]

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16. *Id.* at 360, 200 A.2d at 780.

17. See notes 6 & 7 *supra.*

18. O'Mara v. Pennsylvania R.R., 95 F.2d 762 (6th Cir. 1938).

19. Wollerman v. Grand Union Stores, Inc., 47 N.J. 426, 430, 221 A.2d 513, 515 (1966).

20. Callahan v. National Lead Co., 4 N.J. 150, 154, 72 A.2d 187, 189 (1950).

21. Hansen v. Eagle-Picher Lead Co., 8 N.J. 133, 141, 84 A.2d 281, 285 (1955).

22. 2 HARPER & JAMES, TORTS 1068 (1956).

23. Rosenberg v. Schwartz, 260 N.Y. 162, 166, 183 N.E. 282, 283 (1932).

24. Gutierrez v. Public Serv. Transp. Co., 168 F.2d 678, 680 (2nd Cir. 1948).

25. Warner v. New York, O.&W. Ry., 209 App. Div. 211, 213, 204 N.Y. Supp. 607, 609 (1924).

It is common knowledge that a supermarket extends an invitation to its customers to select their own produce from open bins, bag it, and transport it to a central weighing station. But for the self-service method of marketing, these activities would be performed by employees of the proprietor for whose negligent acts the proprietor would be liable. This responsibility cannot be avoided by the selection of a particular mode of operation and should demand that the proprietor take adequate precautions to protect his customers from the negligence of other invitees. It is properly within the province of the jury to determine what precautions are commensurate with the invitor's duty of exercising due care under the circumstances.

John P. O'Dea